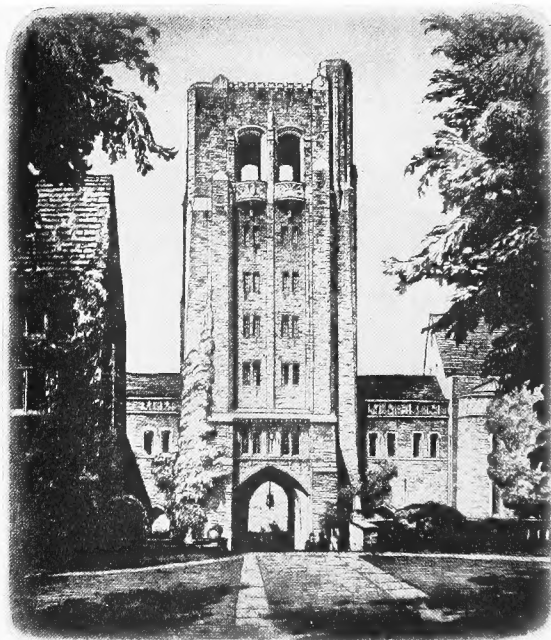


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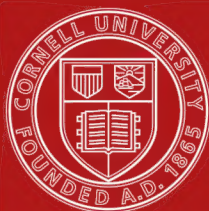
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A TREATISE
ON THE
EQUITABLE JURISDICTION
OF THE
COURTS OF PENNSYLVANIA;
WITH
NOTES OF PLEADING AND PRACTICE IN EQUITY
AND AN
APPENDIX OF PRACTICAL FORMS.

BY FREDERICK C. BRIGHTLY, ESQ.
AUTHOR OF "THE LAW OF COSTS," "NISI PRIUS REPORTS," ETC.; EDITOR OF "PURDON'S DIGEST," ETC.

"To no human science better than to the Law, can be applied the precepts of sacred wisdom in regard to zeal and constancy in the search for truth. Here the race may not be to the swift; but assuredly, the battle will be to the strong."—STORY.

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P R E F A C E .

THE conflict which, for so many centuries, has been waged between the Professors of the Common Law, and those of the Civil Law of Imperial Rome, from which our system of Equity is mainly derived, has not yet ceased. It is but the other day, that one of the most eminent of Pennsylvania jurists declared, that “it was *no* ignorant prejudice, but high political wisdom, which caused our ancestors to refuse a Court of Chancery any place among their judicial institutions.”

And this prejudice, for it *is* nothing more, is, by the opponents of Equity, based on the supposed arbitrary principles of the Civil Law, from which it has been adapted to our own wants and habits. The two main objections which are urged against the Civil Law are, first, the celebrated political maxim of the Institutes, “*quod principi placuit, legis habet vigorem* ;” and secondly, that it teaches that all Governments derive their authority from Divine Right, and not from the will of the governed; which is asserted to be the teaching exclusively of the Common Law.

Both of these are founded on misapprehension; as to the first, of the meaning of the text of the Institutes;

and as to the second, of the political maxims of the civilians. That celebrated and most learned doctor, St. Thomas Aquinas, than whom there could be no higher authority on such a point as this, in his Treatise on Laws, defines law to be, “a rule dictated by reason, the aim of which is the public good, and promulgated by him who has the care of society;” (*qucedam rationis ordinatio ad bonum commune, et ab eo qui curam communitatis habet promulgata.*) Here the maxim of the Institutes is corrected; law is shown to be a rule dictated by reason, and not a pure effect of the will; the idea of despotism and force is banished from the definition.

In regard to the second objection which is urged against the Civil Law, that it teaches that Governments derive their authority from Divine Right, it should be enough to refer to a fact not generally known, namely, that Suarez maintained, against that great advocate of divine right, King James the first of England, the proposition that princes receive power *mediately* from God, but *immediately* from the people. A doctrine which is also distinctly enforced and maintained by numerous continental theologians and jurists.

These facts ought to be sufficient to correct the unfounded prejudice which exists on the part of the Common Lawyers; and to lead to a more general study of that great monument of human wisdom, the Civil Law, and of our own system of Equity, as based upon it.

As the Legislature of Pennsylvania has now, by an enlightened course of enactment, extended, from time

to time, the Equitable Jurisdiction of the Courts of this State, so as to bring within the cognizance of Equity a vast multitude of cases, which had formerly to be settled by means of fictions engrafted upon the forms of common law procedure; the Author, having long felt, in his own practice, the want of a book devoted to the Equitable Practice of the Courts of Pennsylvania, and having collected many authorities and notes of practice, for his private use; has been induced to throw them into their present shape, in hopes that his professional brethren may find their burdens somewhat lightened, by having the equitable principles established by the Pennsylvania Cases presented to them in an accessible form.

That the reader will here find much that is new, is not to be expected; the book would be valueless if it were so. All that the Author has attempted, is to show the law as it is; not to give his own speculations upon what it ought to be. In very few instances has he ventured to make suggestions of his own.

Questions of Equity Pleading and Practice have, as yet, rarely arisen in our Courts; upon this branch of the subject, therefore, he could but select from the most approved works, such principles as he judged most in accordance with right reason, and least dependent upon mere technicality; and which, it is presumed, will be adopted by our own Courts, when like questions shall here arise. The Precedents have been selected with much care from books of authority, and from the records of the Pennsylvania Courts, and are such as were

thought would prove most acceptable and useful to the Equity Draftsman: they are as full as the limited space devoted to them in the Appendix would admit.

The Author sincerely hopes that his work may not only serve to lighten the labours of the Practitioner; but also as a guide to the Student in his researches in the field of Equity Jurisprudence.

F. C. B.

Philadelphia, August 1855.

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 Yard v. Patton, 132, 206, 210, 211.
 York, Mead v., 293.
 Yost v. Eby, 45.
 Young v. Frost, 216.
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 Young v. White, 475.
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 Zimmerman, Stoner v., 38.
 Zion Church v. St. Peter's Church, 403.

ERRATA.

Page 139, § 151, overruled in *Gochenaux's Appeal*, 3 Am. L. R. 486. See page 629, note 1.

- " 299, note 2, for "*Nesmith v. Dunn*," read "*Nesmith v. Drum*."
 " 327, note 3, for "*Bruck v. Lantz*," read "*Bruch v. Lantz*."
 " 356, note 4, for "*Barr v. M'Ewen*," read "*Burr v. M'Ewen*."
 " 375, note 1, for "*Chrisman v. Wagner*," read "*Chrisman v. Wagoner*."
 " 630, note 1, for "*Mittenberger v. Schlegel*," read "*Milttenberger v. Schlegel*."
 " 670, line 1, for "*Bills*," read "*Bill*."
 " 678, line 18, for "*cancelled*," read "*concealed*."

A TREATISE
ON THE
EQUITABLE JURISDICTION
OF THE
COURTS OF PENNSYLVANIA.

BOOK I.

EQUITABLE PRINCIPLES AND JURISDICTION.

CHAPTER I.

HISTORICAL VIEW OF EQUITY IN PENNSYLVANIA.

§ 1. By the original system of English jurisprudence, as explained by Lord Chief Justice Hale, the whole judicial authority of the crown was exercised by the king in person, sitting in his royal court, called the Aula or Curia Regis. Portions of this authority were afterwards delegated to the courts of law; and where an injury had been committed, which the authority of these courts was adequate to redress, a writ under the great seal was issued out of chancery, called an original writ, directed to the sheriff of the county where the injury was alleged to have been committed, containing a summary statement of the cause of complaint, and requiring him to bring the wrong-doer before the proper court of

law, there to answer the plaintiff's charge. The portion of the royal authority which was not thus delegated to the courts of law appears to have remained in the sovereign, as a branch of the prerogative, and to have been naturally intrusted to the Lord Chancellor, as the minister in whose custody the great seal was placed. The manner of its exercise was by another writ, also issuing under the great seal, called the writ of subpoena, which was directed to the defendant personally, and commanded him, under a penalty, to appear to answer such things as were alleged against him, and to abide by the decree which should be made. The principle by which its exercise was regulated appears to have been the one above stated; viz., that of affording an effectual remedy, where the remedy at common law was imperfect, but not, as has been sometimes erroneously supposed, that of creating a right which the common law had denied.¹

§ 2. The first settlers of Pennsylvania brought with them the whole body of the English jurisprudence, (applicable to, and requisite for their wants and situations,) both that which was administered in the courts of chancery, and that which was the guide of the courts of law. The principles of equity, as well as those of law, flowed in upon them from the parent source; but in their simple state of society, they found but little occasion for distinguishing the channels. So far as regarded those princi-

¹ Adams' Eq. xxix. "Equity is the correction of that wherein the law is deficient. To assume jurisdiction in equity of a cause which can as well be determined in an action at law, is not to do equity, but to administer law in a forum not legal. It would not be giving relief, but simply usurping power. It would contravene the fundamental principle, by which the English chancellors themselves have always limited their authority, and turn the justice of the country, without reason, out of the proper and accustomed channels in which it was meant, by the constitution, to be confined." Black, J., in *Finley v. Aiken*, 3 Pittsburgh Leg. J. 2.

ples or rules of justice, our jurisprudence was not greatly defective. They were always recognised, and pervaded our system as thoroughly, perhaps, though not in the same manner, as in the English system.¹ Equity became a part of our law; and our courts were as much bound by the *principles* of equity, which were in force at the Declaration of Independence, as they were by those of the common law.² "I would just as willingly," said one of the most learned of Pennsylvania judges, the late Chief Justice Gibson, "disturb the foundations of the common law, laid in the time of Lord Coke, as shake a principle of equity settled by Lords Talbot, Hardwicke, or Northington."³

§ 3. But it was in the *administration* of justice that the want of equitable modes of procedure was sensibly felt. In order to make the common law forms of procedure subservient to the purposes of equitable relief, it became necessary to resort to fictions, and accordingly, fictions became the substratum of our equity system. Before the revolution, the means of doing justice, for the time being, were withheld from the existing tribunals; a state of things occasioned by the conflict of opinion, first, between the legislature of the province and the privy council in England, and afterwards, between the proprietary or royal governors and the legislature, upon the expediency of establishing a separate chancery tribunal.⁴

¹ Report on the Civil Code, 1834-5, p. 5; *Craft v. Lathrop*, 2 Wall. Jr. 112; *Mathews v. Stephenson*, 6 Barr, 498.

² *Pollard v. Shaafer*, 1 Dall. 211, 213, 214; *Wikoff v. Coxe*, 1 Yeates, 358; *Lehr v. Beaver*, 8 W. & S. 106; *Seitzinger v. Ridgway*, 9 Watts, 498; *Stansbury v. Marks*, 4 Dall. 130; *Ebert v. Wood*, 1 Binn. 217.

³ *Torr's Case*, 2 Rawle, 252-3.

⁴ Upon this subject, Mr. Justice Black remarks, "I think it was not an ignorant prejudice, but high political wisdom, which caused our ancestors to refuse a court of chancery any place among their judicial institutions. The

And though, since the revolution, and the framing of the present Constitution, these wants have, from time to time, been in some measure supplied; yet, notwithstanding these defects of form were often lamented by our judges, the jurisprudence of the commonwealth continued to labour under the reproach of inability to do complete and effectual justice, until the promulgation of a series of statutes, commencing in 1836, by which an enlightened system of equity jurisprudence has been established.¹

§ 4. An examination of the early legislative history of Pennsylvania proves that equity was, for a long time,

men who founded this commonwealth, built up her reputation, achieved her liberties, and settled her laws, knew very well the amount of good and evil which such a court had done elsewhere; and, upon sound and deliberate judgment, they repudiated it as far as they could. The administration of law blended and mixed with equity principles was a happy conception. It is no 'bungling substitute,' but a most admirable improvement of both legal and chancery practice. There never was any natural reason for separating justice from law, or law from justice; and it was emphatically right to break down the artificial wall of partition which certain professional interests had built up between them in the mother country. Some of the states of the Union, after a full trial of chancery, have imitated our example; others are rapidly preparing to do so; and even English reform has gone far in the same direction. It is to be fervently hoped that we will not now extinguish the light by which the world has been walking. The right of trial by jury needs no vindication. It is necessary (if for nothing else) to check the tendency of the judicial mind to run into metaphysical refinements. The two elements of a legal tribunal; the learning of the one, and the practical common sense of the other, have a most salutary influence upon the judgments which both must concur in pronouncing. No mode of ascertaining truth can be infallible. But with a jury that scorns all subtle evasions of plain justice, and a judge who frowns upon vulgar prejudice, we come as near the right as any system can come in this world. To that mode of trial we owe one mighty fact, namely, that, wherever it prevails, lawyers, with an influence always powerful, and often preponderant, are the steady defenders of rational, regulated, constitutional liberty, instead of being, what they are elsewhere, the mere tools of oppression." *Finley v. Aiken*, 3 Pittsburgh Leg. J. 2.

¹ 1 Troubat & Haly's Practice, 37-8.

considered a necessary ingredient in the administration of justice; and repeated efforts appear to have been made to unite the chancery powers with those of the common law courts; which were as often frustrated by the paramount authority of the British government. It appears from the minutes of the provincial council, that, in 1684,¹ a court, consisting of five judges, was constituted, "to try all criminals, and titles of land, and to be a *court of equity*, to decide all differences upon appeals from the county courts." It is believed this court transacted little business. By an act passed in 1693, the several county courts were empowered to hear and determine "all matters and causes in equity," where the subject in controversy was under ten pounds sterling in amount or value. In 1701, in an act "for establishing courts of judicature in this province and counties annexed," we find a provision that the judges of the several courts of common pleas should have full power "to hear and decree all such matters and causes of equity as shall come before them in the said courts; wherein the proceedings shall be by bill and answer, with such other pleadings as are necessary in chancery courts, and proper in these parts; with power also in the said justices to force obedience to their decrees in equity, as the case may require." The supreme court had power, by the same act, to hear and

¹ "At a council, held at Philadelphia, the 26th day, the 1st month 1684. A bill for a provll. court, consisting of five judges, to goe two circuits yearly: quest. put; past in the affirmative." 1 Colonial Records, 98.

"At a council, held at Philadelphia, the 1st of the 2d mo. '84. A bill that every court of justice shall be a court of equity as well as law; also a provll. court for quarter sessions; past a last reading, unanimously.

"Put to the question: all that are of opinion that there shall be a provll. court, consisting of five judges, to try all criminalls, and titles to land, and to be a court of equity, to decide all differences upon appeals from the county courts, say yee. Past in the affirm., *nemine contradicente*." Ibid. 102.

determine appeals in equity causes, and to make such decrees thereon, as should be agreeable to equity and justice. This act was repealed by the Queen in council in 1703. In 1710, another act was passed "for establishing courts of judicature," by which it was provided, that "there shall be a court of equity held by the judges of the respective county courts of common pleas, four times a year, at the respective places, and near the said time as the said courts of common pleas are held, in every county of this province." This act shared the fate of its predecessor, having been annulled in England in 1713. Two years afterwards, another attempt was made by the passage of an act "for erecting a supreme or provincial court of law and equity in this province." This act was annulled in England in 1719. In the succeeding year, in consequence of a resolution of the assembly, Governor Keith established a separate court of equity, exercising the functions of chancellor in his own person, assisted by certain members of the council;¹ and this tri-

¹ "At a council, held at Philadelphia, June the 8th 1720, a resolution of the House of Representatives, dated the 4th day of May last, was laid before the board, and read in these words:

"May 4, 1720. Resolved, that considering the present circumstances of this province, this house is of opinion, that, for the present, the governour be desired to open and hold a court of equity for this province, with the assistance of such of his counsel as he shall think fit, except such as have heard the same cause in any inferior court.

"And some debates arising upon the subject-matter of the said resolution, being of great moment and importance to the inhabitants of this colony, it was referred to further consideration." 3 Colonial Records, 90-1.

"At a council, held at Philadelphia, August the 6th 1720. Whereas, upon the repeal of a late act of assembly of this province, for establishing the several courts of judicature within the same, the governour, to prevent the failure of the administration of justice, which might otherwise ensue thereon, found it necessary, by the advice of this board, and approbation of the assembly, pursuant to the powers granted by the royal charter to the Honourable Wm. Penn, Esqr., late proprietor and governour in chief of this province, his heirs and as-

bunal appears to have existed, nominally at least, until about the year 1736, when, in consequence of the deter-

signs, and to his lieutenants or deputies, to erect, by virtue of his commissions, the several courts of law within this province, which have been regularly held, and justice duly administered thereby; but there being a necessity also, that a court of equity or chancery should be held, for the relief of those who suffer under the rigour of, or cannot obtain their right by the common course of the law, the establishment of which court of equity does not appear practicable, by the same methods with those of the law, as being inconsistent with those of a chancery, as it is practised in all his Majesty's dominions as well in Europe as America.

"The governour, therefore, proposed this matter to the consideration of the assembly, at their meeting in May last, who thought fit to recommend it to the governour to hold such a court of equity himself, with the assistance of the council; whereupon, he was further pleased to desire the advice of this board, who having, at a former meeting, taken the whole into their serious consideration, and deliberately debated the nature of the thing, and the security of the method; it is, at length, resolved:

"That it is the opinion of this board, that by virtue of the powers granted by the royal charter, to the late proprietor, his heirs and assigns, and to his and their lieutents. or deputies, being regularly appointed, the present governour, William Keith, Esqr., safely may comply with the desire of the representatives of the freemen of this province, signified to him by a unanimous resolution of their house, dated at Philadelphia, the 4th day of May last; and that the holding of such a court of chancery, in the manner aforesaid, may be of great service to the inhabitants of this colony, and appears agreeable to the practice which has been approved of in the neighbouring governments.

"But the governour, speaking to his own want of experience in judicial affairs, and representing to the board the great addition of attendance and fatigue in the public business, which would be thereby laid upon him; he was pleased to add, nevertheless, that, considering the many marks the house of representatives and this board had shown of their confidence in him, in this as well as divers other respects, he should not decline to serve the public in that station; but insisted on this, that as no court of chancery could, by the method proposed, be held without him, so that he, on the other hand, should not fail of having a due assistance from the council on their parts; and it was thereupon, at the governour's desire, established and declared:

"That as often as the governour is to sit in chancery, and hold a court, all the members of the council, in or near Philadelphia, shall be summoned to attend the governour, as his assistants upon that bench; and that there shall not any decree be pronounced or made in chancery, but by the governour as chancellor, with the assent and concurrence of any two or more of the six eldest of the council, for the time being; and that those six eldest counsellors or assis-

mined opposition of the legislature, it was discontinued or suppressed.¹ After that year, no attempt appears to

tants, or any of them, may be employed by the governour, as masters in chancery, as often as occasion shall require.

"And that the inhabitants may have due notice of the said court, it is ordered, that a proclamation be issued, certifying all his Majesty's liege people of this province, that for the more equal distribution of justice, and the conveniency of the subject, a court of equity or chancery will be opened by the governour, at the court-house in Philadelphia, upon the 25th day of this instant, August, in order to hear and judge of all such matters within this province, as are regularly cognizable before any court of chancery, according to the laws and constitution of that part of Great Britain, called England, and that the said court will be always open for the relief of the subject; whereof his Majesty's judges of the supreme court, and the justices of the inferior courts, and all others whom it may concern, are to take notice, and to govern themselves accordingly." 3 Colonial Records, 105-6.

' In consequence of the hostility of the people of Pennsylvania to this court, the opinion of Mr. Attorney-general Willes, afterwards Lord Chief Justice of the Court of Common Pleas, and of Mr. Solicitor-general Ryder, afterwards Lord Chancellor, was asked as to the legality of the court thus established. The case and opinions will be found in a work entitled, "Letters and Papers chiefly relating to the Provincial History of Pennsylvania;" edited by Thomas Balch, Esq., to whose kindness the author is indebted for the proof sheets from which the following extract is made. The first part of the MS. from which this case is printed, is missing; but this in no manner interferes with the proper understanding of the case.

"The case of the Court of Chancery in Pennsylvania, with the opinions of Mr. Willes and Mr. Ryder.

"Upon this foot the court of chancery, in Pennsylvania, having been established, continued to exercise jurisdiction in matters of equity, proceeding therein, as near as they conveniently could, according to the known usage or practice of his Majesty's high court of chancery at Westminster. Nor were the proceedings of the said court complained of in any sort, or its authority called in question, until January 1735, though two acts of assembly for establishing the courts of law in Pennsylvania, were passed in that interval of time, and fourteen assemblies (this being the fifteenth) have been held.

"Upon divers petitions presented, January 27th 1735, to the house of assembly, complaining that the court of chancery in this province is erected in violation of the charter of privileges, the house came to the following resolution, viz:

"*Resolved*, That the court of chancery, as it is at present established, is contrary to the charter of privileges granted to the freemen of this province.

"And upon conferences since had between the governor and the assembly,

have been made, either to create a distinct court of chancery, or to invest the common law courts with general chancery powers.¹

(which two alone, without the governor's council, compose [legislative power] Pennsylvania,) the assembly have argued from the [authority] of several English law books, that the king, at this day, cannot, by his commission, erect a court of equity.

"Your opinion is desired:

"*Question*.—Whether a court of equity is not a vital and fundamental part of the English constitution, incident to and inseparable from it? And whether the power of determining cases on bill in equity is not, by the fundamental laws and constitution of the kingdom of England, vested in the king, as supreme magistrate, and in the chancellor, acting under his appointment?

"*Answer*.—It is pretty difficult to trace out the original foundation of courts, most of them having their beginning either from necessity or expedience. But it has been always held, that the power of determining cases in equity was originally vested in the king of England, and that the chancellor only acted by virtue of a delegated power from him, being appointed at first as his assistant, when causes in equity began to be so very numerous that the king could not despatch them himself.

"*Question 2*.—Whatever courts the king may now erect by his commission [in] England, where all necessary courts are already in being; yet, whether king Charles the second could, by law, grant sufficient authority, by a commission under the great seal, unto William Penn and his deputies, to erect courts of equity in the province of Pennsylvania; or is it absolutely necessary that the consent of the legislature there should first be had, in order to the erecting such courts?

"*Answer*.—Though it is held that his Majesty cannot now, by his commission, erect a new court of equity in England, where all proper courts have been long since established; yet, I am of opinion, that king Charles the second, when he was erecting a new form of government in Pennsylvania, might, by his charter, grant to William Penn and his deputies, a power to erect new courts of equity in that province, and that the consent of the legislature there was not necessary to be first had, until Mr. Penn made it so by his instrument or charter, of the 28th October 1701.

"*Question 3*.—Whether the unanimous resolution of the assembly, requesting Mr. Keith to open and hold a court of equity for the said province, with the assistance of his council, laid before him on the [4th May 1720,] his assent to that request, and establishment of [a court] pursuant thereto, by the advice of his council, the subsequent approbation of the assembly given to that establishment, and the notification thereof to the public in Pennsylvania, by written

¹ Report on the Civil Code, 1834-5, p. 8-10.

§ 5. In consequence of this want of appropriate equitable remedies, our supreme court and courts of common

proclamation under the great seal there, may not be called an act of the whole legislature there, although not rendered in the ordinary form of law, or at least, may not be deemed a sufficient signification of the consent of the legislature thereto?

Answer.—I am of opinion that the unanimous resolution of the assembly, 4th May 1720, what was afterwards done by governor Keith and his committee thereupon, the subsequent approbation of the assembly, and the proclamation which issued thereupon, sufficiently established the present court of chancery, notwithstanding the clause relating thereto in the said charter of the 28th October 1701; for I think that there has been a sufficient declaration of the assent of the legislature, to the erecting of such court.

Question 4.—Whether the original establishment and holding of the court of chancery by such devise as aforesaid, after the time of William Penn's charter of privileges to the inhabitants, but before the resolve of the Assembly, in January 1735, can justly be construed as a violation of the sixth clause of the said charter (whatever that clause may import,) seeing it was provided that the governor, and six parts in seven of * * * the Legislature might alter the charter—or whether a proceeding, heretofore before the governor and his council, (not as a council of state, but as a court of chancery, according to equity and stated rules of practice of that court,) was not a proceeding *in the ordinary course of justice*, and consequently within the reservation in the said sixth clause?

Answer.—I am of opinion that neither the establishment nor the holding of the said court of chancery, after the consent of the assembly, so declared as aforesaid, can be construed to be a violation of the sixth clause of the said charter. But if the governor and council, after that charter, had proceeded to hear cases in equity, without such consent of the assembly, I should have been of opinion that it had been contrary to the said charter.

Question 5.—Whether since the assembly have come to their resolution of January 1735, it will now be contrary to the charter of privileges, or unlawful to continue to hold the said court of chancery, notwithstanding such last mentioned vote, or ought the court of chancery to be established by act of assembly, and not otherwise?

Answer.—As I am of opinion that this court of chancery was at first legally and rightfully [established,] I do not think that it will be contrary to the chart- [er or un-] lawful to continue to hold the same. But I am of opinion that the same may be lawfully held till the whole legislature have passed an act to the contrary.

“August 21st 1736.

J. WILLES.”

Answer to question 1.—I am of opinion that a court of equity is a necessary part of the English constitution, that relates to the administration of justice: and that the chancellor appointed by the king, [or] the keeper of the great seal, are, by virtue of their office, entitled to exercise that jurisdiction.

pleas exercised, from the beginning, the power of giving relief and administering equity through the ordinary common law remedies and forms;¹ that is, through the medium of the usual actions; the pleadings appropriate to each; conditional verdicts; special judgments; and the final process adequate to obtain and enforce the fruit of them. The common law remedies, that have long been made the vehicles of equitable rights in this state, are the actions of assumpsit, debt, covenant, replevin, ejectment and partition. Perhaps, indeed, all the personal actions may be here called equitable remedies; as, from the right of a defendant to plead an equitable defence to

“Answer to question 2.—I conceive that king Charles second might, by law, grant power to William Penn and his deputies, to erect a court of equity in Pennsylvania, without the consent of the legislature there.

“Answer to question 3.—I conceive this is not an act of the legislature there, nor a sufficient signification of their approbation, supposing their approbation was necessary.

“Answer to question 4.—I conceive the establishing the court of chancery in the manner above mentioned, was no violation of the sixth clause of the charter of 1701, both because there was the assent of the governor, and six parts in seven of the assembly met, and because the proceeding in a court of equity may be justly called the ordinary course of justice.

“Answer to question 5.—I apprehend the resolution of the assembly does not make that illegal which was not so before, therefore that it is not unlawful to hold the [said] court of chancery, notwithstanding that resolution.

“October 13th 1736.

D. RYDER.”

¹ Mathews v. Stephenson, 6 Barr, 498. In Wharton v. Morris, M’Kean, C. J., remarked, that “the want of a court with equitable powers, like those of the chancery in England, had long been felt in Pennsylvania. The institution of such a court, he observed, had once been agitated here; but the houses of assembly, antecedent to the revolution, successfully opposed it; because they were apprehensive of increasing by that means, the power and influence of the governor, who claimed it, as a right, to be chancellor. For this reason, many inconveniences have been suffered. No adequate remedy is provided for a breach of trust; no relief can be obtained in cases of covenants, with a penalty, &c. This defect of jurisdiction, has necessarily obliged the court, upon such occasions, to refer the question to the jury, under an equitable and conscientious interpretation of the agreement of the parties.” 1 Dall. 125–6. And see Seitzinger v. Ridgway, 9 Watts, 498.

any one of them, the reply to such a defence may take the same complexion, and thus, at last, the action may result in procuring for the plaintiff the fruits of a merely equitable right.¹

§ 6. The mode of administering equitable relief, through the medium of common law proceedings, is well illustrated by Justice Tod in *Bixler v. Kunkle*.² The learned judge there said, "To the argument that this demand is founded on mere equity, and cannot be enforced by any form of action of the common law, I would say, that ever since the time of *Kennedy v. Fury*,³ in which a *cestui que trust* maintained an ejectment in his own name, and, I believe, long before, mere equitable rights have been every day recovered in our courts. It seems to me, that the rules of equity have, by immemorial usage, become rules of property in our state, and cannot, I apprehend, be now departed from without legislative authority. Cases need not be cited to show how rights purely equitable have been sued for with success, in the forms of action known only to the common law, and how relief has invariably been granted, whenever it could be granted in any way consistent with these forms; generally, by the courts with the aid of a jury—often without. Not only have conditional judgments repeatedly been given, but, in the *Lessee of Mathers v. Akewright*,⁴ the court, on a general verdict for the plaintiff, and judgment thereon, ordered a stay of execution until the defendant should be secured in his title to another piece of land, according to an article of agreement. In the case of *Morris's Executors v. McConaughy's Executors*,⁵ the court, on motion, directed a contribution

¹ 1 Troubat & Haly's Practice, 106-7; *Schrader v. Decker*, 9 Barr, 16; *Knox v. Flack*, 10 Harris, 339.

² 17 S. & R. 308.

³ 1 Dall. 72.

⁴ 2 Binn. 93.

⁵ 2 Dall. 189; 1 Yeates, 189.

among the several holders of lands bound by the same mortgage."

§ 7. The action of assumpsit for money had and received has, in Pennsylvania, been made an ordinary vehicle of equitable jurisdiction. "Though there may be some positions, in *Moses v. Macferlan*,¹ advanced by Lord Mansfield, which his successors have cancelled from it, the leading doctrine of the nature of this action has never been questioned. The great objection to some of his positions is, that they have been laid down too largely, when he says, that a court of common law may sustain this action, wherever one man has money which another ought to have, or wherever one man has an equitable right to the money, he has also a legal action. Since courts of common law cannot administer equity in the same way courts of equity can, we have adopted the most liberal principles in this action, and, because we have no court of chancery, sustained the action where one man unjustly holds the money of another. In every case, the tort may be waived; where the party has received your money, trespass or trover may be converted into this action. Where the defendant has turned another's article into money, or there is reasonable evidence that he has, as in the case of the masquerade ticket, the tort may be waived. But where you do this, you ratify the conversion; you adopt his act, and can recover nothing more than he has received. In England, not even interest; but here, the money received, with interest, may be recovered. A man may disaffirm the act *ab initio*, by reason of the fraud, and bring his special action, and recover his actual damages; or affirm it, and demand his money; he may make his election."²

¹ 2 Burr. 1005.

² Duncan, J., in *Lee v. Gibbons*, 14 S. & R. 111. And see *Mathers v. Pearson*,

§ 8. The action of covenant may, in some cases, be used as a means of enforcing a purely equitable right. Thus, where by articles of agreement for the sale of land, a deed was to have been delivered at a certain time, and by a subsequent penal agreement, the vendee agreed to receive the deed at a later period, and accepted it accordingly; it was held, that the vendor, in covenant for non-payment of the purchase money, might declare according to the circumstances of the case, by setting forth, in the first place, the covenants according to the articles of agreement, and then showing the alteration which had been made by consent of parties.¹ The plaintiff must, in all such cases, set forth the special circumstances on which his equity is supposed to arise.²

§ 9. The action of replevin, from the liberal extension of it by our courts, has become a very effectual vehicle of an equitable right; it may be employed both to prevent and counteract fraud, and to compel the specific execution of a contract relating to personal property. It is applicable to every case in which goods and chattels, in the possession of one person, are claimed by another; and no distinction is made between those instances in which there has been a tortious deprivation of the possession, and others, in which the dispute is only as to the title or ownership. By means of this action, not only may family pictures, for which an agreement has been made, be obtained, but also merchandise, when the par-

13 S. & R. 258; *Bixler v. Kunkle*, 17 S. & R. 298; *Irvine v. Bull*, 4 W. 287; *Loan Co. v. Elliott's Executors*, 3 Harris, 227; *Work v. Work*, 2 Harris, 318; *Stoner v. Zimmerman*, 9 Harris, 394.

¹ *Jordan v. Cooper*, 3 S. & R. 578.

² *Barndollar v. Tate*, 1 S. & R. 160; *Clark v. Partridge*, 2 Barr, 13; *Partridge v. Clarke*, 4 Barr, 166; *Renshaw v. Gans*, 7 Barr, 118; *Butcher v. Metts*, 1 M. 153.

ticular bale can be distinguished. Nor is the plaintiff restricted to the continuance of the possession in the defendant; he may follow the property through successive transfers, and, as the doctrine of market overt has been adjudged not to hold in Pennsylvania, he may replevy it, wherever found.¹

§ 10. The equitable action of ejectment forms, in this state, an important branch of the law. Through the liberality and ingenuity of the courts, it has become the most important and universal mode of enforcing the equity of a plaintiff relating to land. It is a remedy which has been substituted for the bill in equity; though it is subject to all those considerations, by which a claim to have the land itself, may be defeated. The rule is, that wherever equity will presume a trust to have arisen, and will compel its execution, or will enforce articles of agreement, our courts will, through the application of this remedy, administer the same relief. Thus, the vendee of lands, by articles of agreement, who has complied with his part of the contract, as by payment or tender of the purchase money, may, by ejectment, obtain possession, if withheld by the vendor.² In exercising the

¹ 1 Troubat & Haly's Practice, 108-9.

² If a vendor brings ejectment to compel payment of the purchase money and obtains a conditional verdict, to be released upon payment of the balance due within a prescribed time, and the time is suffered to pass, without payment, the vendor may take possession, as absolute owner. In some cases, a rigid adherence to this rule has produced injustice; for valuable property has been sacrificed, from the inability or neglect of the vendee, or other cause less culpable, to comply with the exact terms of this conditional verdict. For remedy of this, a modification of the practice has been recommended. Instead of framing the verdict in such way, that an absolute title vests in the vendor, on failure to pay, at the time fixed in the verdict, it would be better that, if not paid at the time, it should contain a decree of sale, either by the sheriff, or by a master under the direction of the court, for the benefit of the vendor and vendee, and all other persons having an interest in the proceeds. A verdict

right, the general form of this action in common use is adopted, and the articles are not required to be spread upon the record. The plaintiff is required to allege and prove no more than would induce a chancellor to decree a specific performance of the agreement; though less would not avail him.¹

§ 11. An equitable estate is sufficient in Pennsylvania to support the action of partition. In the case of *Stewart v. Brown*,² the defendant had bought lands, under an agreement with the plaintiff, that the purchase when made should be for their equal, mutual interest; the latter had never been in possession; but the court held, that the agreement of the defendant made him a trustee for the use of the plaintiff, as to one moiety, and that the action of partition was maintainable against him to obtain it.³

and judgment in this shape, would be attended with this decided advantage, that the vendor would, in due time, receive the unpaid purchase money, and the vendee would receive the surplus, if any; and, what is of no inconsiderable importance, the purchaser at the sale would obtain a title free from all doubt or difficulty. The sale being made under the order and direction of the court, and the money being substituted for the land, and under their control, in its distribution, substantial justice may be done to all. And this course would be equitable, for, in truth, the action of ejectment to compel payment of the purchase money, is an equitable proceeding. *Hewitt v. Huling*, 1 Jones, 34-5.

¹ 1 Troubat & Haly's Practice, 109; *Seitzinger v. Ridgway*, 9 Watts, 498-9. A vendee, under an executory contract for the purchase of land, who has obtained the possession of it, under his agreement, can only defend himself, in that possession, in Pennsylvania, where we have no court of chancery, upon such ground as would entitle him to a decree of injunction, by a court of equity, against his vendor, who was proceeding by action of ejectment at law, to turn him out of the possession. The action of ejectment to enforce payment of the purchase money, is not founded upon the contract, but rather upon the legal title to the land being still in the plaintiff, who is not bound, by his contract, to part with it, until he shall have received from the defendant, the purchase money; and the defendant, having failed to pay it, according to the terms of his contract, has no claim, even in equity, to hold the possession. *Smith v. Webster*, 2 Watts, 486.

² 2 S. & R. 462.

³ 1 Troubat & Haly's Practice, 109-10.

§ 12. There are other modes by which our courts are in the constant practice of enforcing an equity in favour of the plaintiff in a common law action, which in England could only be obtained by a recourse to chancery. The first instance is, the case of a lost bond, on which the owner could not maintain an action, in a strictly common law tribunal, because he could not make *profert* of it; and therefore, would be obliged to recur to chancery, for an injunction to prevent the defendant from taking advantage of its non-production. But in our courts, the plaintiff may state his claim on the bond, and explain the reason why he cannot produce it, *i. e.* he may declare without a *profert*.¹ The benefit of the same rule is open to a defendant who may have occasion to plead a lost deed. Another instance is, the case of a plaintiff having a joint demand against several parties, one of whom is dead, and the survivor insolvent. At common law, the plaintiff could only sue this survivor, and to get at the estate of the deceased party, he would have to recur to chancery. But our system allows suit to be brought against the executor or administrator of the latter, through whom a judgment may be obtained against the property of the decedent;² and, by act of assembly of 11th April 1848, in such action, the insolvency of the survivor need not be averred on the record, or proved at the trial, to enable the plaintiff to recover.³

§ 13. A defendant, in Pennsylvania, is permitted to give evidence of equitable matters under the general issue; or if this mode be inconvenient or improper in his particular case, he may plead specially his equitable right, and thus obtain the advantages of a chancery answer so

¹ *Respublica v. Coates*, 1 Yeates, 2.

² *Stiles v. Brock*, 1 Barr, 216; *Lang v. Keppele*, 1 Binn. 123.

³ *Purd. Dig.* 633, pl. 7.

far as they relate to a complete statement of his case. In making, however, an equitable defence in a court of law, he is in effect a plaintiff in equity, and is bound to show such a state of things, affirmatively, as would authorize a chancellor to interfere by injunction.¹

§ 14. The usual general plea, under which a defendant is permitted to establish an equitable defence is that of payment. The practice of giving in evidence, under the plea of payment, matters relating to a defence, whose only foundation is equity, may be traced to the earliest stages of our jurisprudence, and is a branch of the common law that arose out of the peculiar wants of the province of Pennsylvania. The general rule adopted by the courts is, that whatever would be sufficient in equity to protect the party, will be admitted in evidence under the general plea of payment; and that shall be presumed to be paid, which, in equity and good conscience, ought not to be paid. The cases in our reports serve very fully to illustrate and prove this general principle, as they include almost every species of defence usually made in a court of chancery. These may be classed under the heads of want of consideration, fraud, mistake, and accident; any of which may be given in evidence under this general plea.² To avoid surprise on the trial our courts have adopted rules requiring a previous notice to be given of the equitable defence intended to be established.

§ 15. This notice, in substance, often amounts to a bill in equity, and if the defendant present and prove a case on which he would be entitled to relief in equity, he will be entitled to a verdict here. But if, in his notice of special matter, he present a case in which equity

¹ 1 Troubat & Haly's Practice, 110; *Lehr v. Beaver*, 8 W. & S. 106.

² 1 Troubat & Haly's Practice, 111-14.

would afford no relief, the plaintiff, instead of putting the cause to the jury, may object to the evidence, and pray the opinion of the court on it, and if the court be of opinion that it is a case in which equity would not relieve, the evidence will be rejected, *in toto*, as irrelevant; or if any part of it be such as would not be received in equity, that part will be rejected.¹ The general pleas of non assumpsit, and of performance or covenants performed, with notice of the special matter intended to be given in evidence under them, are likewise the common vehicles of a purely equitable defence.

§ 16. Under the plea of payment, a defendant may also, under our statute of defalcation, give evidence of any counter-claim against the plaintiff, whether it be legal, or merely equitable in its character, and if the set-off proved exceed the claim of the plaintiff, the jury may certify a sum to be due from the plaintiff to the defendant, upon which he may have judgment and execution.² The rules of court require that previous notice of the set-off, intended to be proved under the general plea, should be given to the plaintiff; but no other plea than that of payment is necessary to let in a set-off under our statute.³ And it is to be noted, that there is this difference between the plea of payment with notice of defalcation, and that of payment with notice of an equitable defence, that under the former, the defendant may recover a balance against the plaintiff, whilst under the latter, he can only have a general verdict.⁴

§ 17. As an equitable title may be made the foundation of an action of ejectment, and is sufficient to ground

¹ Robinson v. Eldridge, 10 S. & R. 142.

² Purd. Dig. 237.

³ Balsbaugh v. Frazer, 7 Harris, 95.

⁴ King v. Diehl, 9 S. & R. 409; Anderson's Executors v. Long, 10 S. & R. 62.

a recovery, it follows, as a natural consequence, that it may protect the actual possession of a defendant; and, as it is provided by statute, that the general plea of *not guilty* shall be the only plea put in by the defendant, the equitable defence is receivable under this plea. If the equity of the defendant be merely founded on the non-performance of a particular act by the plaintiff, such as the payment of purchase money, or making title to a part of the land, it is always made a prerequisite to the recovery of the possession of the land by the latter; and may be either relied on in the defence, or judgment will be arrested by the court until it is performed.¹ When the equity of a defendant goes to a total denial of the title of the plaintiff, it is supported by a recurrence to the principle which forms the ground-work of the equitable action of ejectment, that everything shall be presumed to be done, which in good conscience ought to have been done. If therefore, the party ought to have received proper title deeds, he will be considered in the same situation as if they had been actually delivered to him; and the same course will be pursued with every other equity to which he may be entitled.²

§ 18. Whenever the pleas before enumerated would be inconvenient or improper, from the nature of the action, the defendant may (with the single exception of the action of ejectment) state his equity specially, and the courts will support it as a sufficient defence. The practice of pleading specially the equity of a defendant, possesses one of the most important advantages of the answer in chancery, in stating at length all the circumstances of the case, without regard to their intricacy or complication. But for this method, the operation of equity would be

¹ Mather's Lessee *v.* Akewright, 2 Binn. 93.

² Griffith *v.* Cochran, 5 Binn. 105; M'Call *v.* Lenox, 9 S. & R. 315.

narrow and restricted; as the rule now is, it supplies all the chasms left by the general pleas, so that no case can possibly occur in which a defendant may not rely upon his equitable right, as fully and completely in a Pennsylvania court of law, as in an English court of chancery.¹ And so highly is the right of pleading an equitable defence favoured by our courts, that they have determined, after some conflict of decision, that a defendant who has neglected to give notice of the special matter intended to be proved under the plea of payment, may amend on the trial, by filing a plea founded upon such special equity.² If, by such amendment, the plaintiff be taken by surprise, he is entitled to a continuance of the cause.³

§ 19. If a plea be put in, founded in equity only, the plaintiff will be permitted to make a replication to it, stating any special matter to rebut or destroy that equity. But if, instead of an equitable special plea, the defendant plead payment, and give notice of an equitable defence, the plaintiff may, under the replication of *non solvit*, give evidence of other special matter to rebut the defendant's equity, without notice, for the defendant might have obviated the danger of surprise by pleading specially.⁴ It does not seem necessary that any equitable pleadings should have been previously put in, to justify the use of *non solvit* as an equitable replication, for it may happen that the plea of the defendant which is strictly at common law, may, for the first time, compel the plaintiff to rely upon equitable grounds for the establishment of his action.⁵

¹ 1 Troubat & Haly's Practice, 119.

² Sharp v. Sharp, 13 S. & R. 444; Yost v. Eby, S. C., June, 1854; contra 8 S. & R. 498; 14 S. & R. 176; 6 Barr, 147; 9 Leg. Int. 46. See 9 Harris, 475.

³ Purd. Dig. 38.

⁴ M'Cutchen v. Nigh, 10 S. & R. 341.

⁵ 1 Troubat & Haly's Practice, 120.

§ 20. Another mode of obviating the want of a court of equity, where such a court would enjoin a party from proceeding at law, or where the specific execution of a contract, or the performance of a trust, is of right due to the plaintiff, is through the instrumentality of the jury, who may wield the damages so as to effect the desired end. It seems, that in all actions, whether relating to personal or real property, the jury may, when the plaintiff sets out in his declaration the whole ground of his equitable right, (for this has been held to be a prerequisite to secure a conditional verdict¹) find large damages conditionally; that is, to be released, on condition that the terms which the jury, and the jury alone, prescribe, are complied with.² Thus, in a case where chancery would enjoin the obligee in a bond from proceeding at law, whilst the obligor is a loser or in jeopardy as a surety of the former, the jury may produce the same result by a conditional verdict.³ Thus, too, a specific performance of an agreement for the sale of lands, if it be not within the statute of frauds, may be enforced by a conditional verdict.⁴ And there are many cases of ejectment, where such verdicts have been recommended by the court, in matters of trust, and executory contracts.⁵ The action itself, as we have seen, approaches very near to a bill in equity; and the verdict of a jury, imposing conditions on the party in whose favour it is rendered, performs the office, though imperfectly, of the decree.⁶ In all these cases, the jury are to be governed by the rules and prin-

¹ *Irvine v. Bull*, 4 W. 289; *Butcher v. Metts*, 1 M. 153.

² *Decamp v. Feay*, 5 S. & R. 323; *Coolbaugh v. Pierce*, 8 S. & R. 418.

³ *Frantz v. Brown*, 1 P. R. 257; *Ross v. M'Kinny*, 2 R. 227.

⁴ *Irvine v. Bull*, 4 W. 287.

⁵ *Collins v. Rush*, 7 S. & R. 155.

⁶ *Coolbaugh v. Pierce*, 8 S. & R. 419.

ciples of equity, which they are to learn from the charge of the judge.¹

§ 21. Although a verdict in the alternative would be erroneous, there are many instances in practice in which a cautionary verdict is allowed; as where a verdict is rendered for the plaintiff in ejectment, or for a penal sum in an action for damages, to be enforced unless the defendant pay a sum of money, or do certain specified acts. The court can judge whether the defendants comply with the terms of the verdict, and mould the judgment accordingly. They are, for the most part, obliged to decide on affidavits and depositions; and, as these constitute no part of the record, they are, like the granting of a new trial, subjects not inquirable into on error.² In debt on bond for purchase money of land, a verdict may be given for the plaintiff, conditioned that no execution shall issue for the amount until he remove an encumbrance on the land.³

§ 22. Besides this use of conditional verdicts, in actions at common law, adopted here to enforce equitable rights, the courts must, in such cases, if necessary, mould their judgments and executions to suit the case; and they will render them specially, to affect certain property only, and allow special executions to be levied on that property alone.⁴ Thus, the court will enter judgment specially, so as to make it appear that it does not bind the defendant's property, but only such as is held in trust; to reach which was the object of the suit, in the nature of a bill in equity.⁵

¹ 1 Troubat & Haly's Practice, 120-1.

² *Moyer v. Germantown Railroad Co.*, 3 W. & S. 92.

³ *Roland v. Miller*, 3 W. & S. 390; and see *Reed v. Muncy*, 1 J. 334; *Adams v. Smith*, 7 H. 182; *Patterson v. Wilson*, *Ibid.* 383.

⁴ *Pidcock v. Bye*, 3 R. 194.

⁵ *Aycinena v. Peries*, 2 Barr, 286.

§ 23. Equitable rights having thus, by the liberality of the judiciary of Pennsylvania, become vested and tangible interests at law, it was necessary to the complete attainment of justice, that the new advantage thus vested in the party should be attended with its corresponding burdens. Proceeding upon this just and natural principle, it has been decided in our courts, that every species of equitable right is subject to the lien of a judgment, and may be sold so fully and completely under an execution, that the sheriff's vendee will stand in precisely the same situation as the original defendant.¹ This rule, resulting from a connected series of decisions, is thus stated by the late Chief Justice Tilghman: "By the law of Pennsylvania, all the real estate of the debtor, whether legal or equitable, is bound by a judgment against him, and may be taken in execution, and sold for the satisfaction of the debt. At common law, an equitable estate is not bound by judgment, or subject to an execution; but the creditor may have relief in chancery. We have no court of chancery, and have, therefore, from necessity, established it as a principle, that both judgments and executions have an immediate operation on equitable estates."²

§ 24. Until the passage of the act of 1836, these, with the exception of a few cases in which statutory remedies were provided, were the only means, in the power of our courts, for enforcing equitable rights. And parties may still, in their discretion, adopt the means here pointed out, and maintain a common law action upon an equitable title, for the remedies are concurrent; in conferring on the courts chancery powers, the legislature has not ousted them of their common law jurisdiction.³ Nor is

¹ 1 Troubat & Haly's Practice, 122.

² Auwerter v. Mathiot, 9 S. & R. 402; and see Stiles v. Bradford, 4 R. 402.

³ Aycinena v. Peries, 6 W. & S. 257.

the extension of the remedy, by action at law, to cases originally within the jurisdiction of equity, a bar to the equitable jurisdiction of the courts for the same cause.¹ They are concurrent remedies, either of which a party may pursue at his election. Whether a case may be brought in the chancery forum, is only a question of form and not of jurisdiction; and the objection is waived, if not made in due season.² It must be taken advantage of by demurrer, and not by an objection to the jurisdiction of the court.³

§ 25. And it must be borne in mind, that the legislature has by no means conferred on the courts a universal, or even a general equity jurisdiction; on the contrary, equity jurisdiction has been dealt out to them at distant intervals, and in limited portions, and they cannot usurp a jurisdiction not granted, nor exceed the limits within which the legislature has thought proper to prescribe it.⁴ Hence, unless the jurisdiction invoked be plainly and clearly given, they must refuse its exercise, and refer the plaintiff to the remedies afforded by the past practice of the commonwealth.⁵ The only cases in which they have been invested with a general and unlimited jurisdiction, are those involving the supervision and control of corporations, unincorporated associations and partnerships.⁶

¹ *Wesley Church v. Moore*, 10 Barr, 274; and see *Kirkpatrick v. M'Donald*, 1 J. 392.

² *Neel v. Neel*, 1 Troubat & Haly's Practice, 63.

³ *Adams v. Beach*, 7 Leg. Int. 178. The doctrine in the text, however, only applies to those courts which have jurisdiction of the subject matter, both at law and in equity. *Finley v. Aiken*, 3 Pittsburgh Leg. J. 1.

⁴ *Gilder v. Merwin*, 6 Wh. 540; *Cassel v. Jones*, 6 W. & S. 553; *Hagner v. Heyberger*, 7 W. & S. 106.

⁵ *Dalzell v. Crawford*, 1 Pars. 41.

⁶ *Purd. Dig.* 305. *Com. v. Bank of Pennsylvania*, 3 W. & S. 184.

§ 26. The orphans' court has, indeed, always been essentially a court of equity.¹ Its jurisdiction is limited, but within its peculiar range, it has, from the earliest times, exercised many of the functions of a court of chancery: within its appointed orbit its jurisdiction is exclusive; and therefore, necessarily, as extensive as the demands of justice.² But although the orphans' court has been called a court of equity, in respect to the few subjects within its jurisdiction, the auxiliary powers of such a court have not been given to it. It is a special tribunal for specific cases; and its resemblance to a court of equity consists in its practice of proceeding by petition and answer, containing the substance, but not the technical subtleties and nice distinctions of a bill in equity; by which, however, justice is obtained more conveniently, and as certainly, as in the courts of equity, purely so called. As the orphans' court, therefore, has not the general powers of a court of equity, it cannot entertain a bill of discovery.³

¹ *Com. v. The Judges*, 4 Barr, 301.

² *Shollenberger's Appeal*, 9 Harris, 341.

³ *Brinker v. Brinker*, 7 Barr, 53.

CHAPTER II.

ACCIDENT.

§ 27. JUDGE STORY, in his commentaries on equity jurisprudence, divides the subject into three great heads, the concurrent, the exclusive, and the auxiliary or supplemental jurisdiction. The concurrent jurisdiction, he says, has its true origin in one of two sources; either the courts of law, although they have general jurisdiction in the matter, cannot give adequate, specific, and perfect relief; or, under the actual circumstances of the case, they cannot give relief at all. Its original foundation may be fitly referred to what Lord Coke deemed the true one—fraud, accident, and confidence.¹

§ 28. In the first place, let us consider the jurisdiction arising from accident. By the term accident is here intended, not merely inevitable casualty, or the act of God, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party.² It is not every case of accident which will justify the interposition of a court of equity. The jurisdiction being concurrent, will be maintained only, first, when a court of law cannot grant suitable relief; and secondly, when the party has a conscientious title to relief.³

¹ Story's Eq. § 75-6.

² Ibid. § 78.

³ Ibid. § 79; Jeremy's Eq. 358-9; Fonbl. Eq. B. I. ch. i. § 3, p. 15.

§ 29. Formerly courts of law did not interfere to grant relief in many cases where now such relief may be obtained at law. At that time courts of equity interfered to prevent injustice, and although the courts of law, with more liberality, now afford relief in such cases, yet courts of equity having once obtained jurisdiction, now retain it as a concurrent remedy with courts of law; it being considered that the latter courts are not competent, by their own act, to oust or repeal a jurisdiction already rightfully attached in equity.¹ One of the most common interpositions of equity under this head is, in the case of lost bonds, or other instruments under seal. Until a recent period, the doctrine prevailed, that there could be no remedy at law upon a lost bond, because there could be no *profert* of it, without which the declaration would be defective. At present, however, the courts of law do entertain the jurisdiction, and dispense with the *profert*, if an allegation of loss, by time or accident, be stated in the declaration. But this circumstance is not permitted to change the course in equity.²

§ 30. The reasons for interfering in case of a lost bond never applied to that of a lost negotiable note, or other unsealed security, because no *profert* was necessary, nor was oyer allowed of such an instrument; and a recovery could be had at law, upon mere proof of the loss. But then, a court of law cannot insist upon the party's giving a suitable bond of indemnity; and in such case, a court of equity will entertain a bill for relief, upon an offer, in the bill, to give a proper indemnity under the direction of the court, but not without. And such an offer entitles

¹ 4 Bouv. Inst. 156.

² 1 Story's Eq. § 81; Snyder v. Wolfley, 8 S. & R. 331; Harrison v. Rowan, 4 W. C. C. 205.

the court to require an indemnity, not strictly attainable at law, and founds a just jurisdiction.¹

§ 31. In the case of supposed lost instruments, where relief is sought (and not merely discovery) an affidavit by the plaintiff of the loss of the instrument, and that it is not in his possession or power, is indispensable to sustain the bill, and, in order to maintain the suit, it is further indispensable, that the loss, if not admitted by the answer, should, at the hearing, be established by competent proof. For the very foundation of the suit in equity rests upon this most material fact. If, therefore, the plaintiff should fail to establish the loss of the instrument, or the defendant should overcome the plaintiff's proofs by countervailing evidence, the bill will be dismissed, and the plaintiff remitted to his action at law.²

§ 32. There are many other cases of accident in which courts of equity will grant both discovery and relief. One of the earliest exercises of the jurisdiction of the court, was to relieve from the forfeiture of a bond, or of a mortgage, when it was not paid at the day appointed, on the ground that it was unjust for the creditor to avail himself of the penalty, when an offer of full indemnity was tendered. So, where a mortgage is payable by instalments, with a stipulation that if the instalments be not promptly paid, a scire facias may issue for the whole amount of the mortgage; it seems, equity will grant re-

¹ 1 Story's Eq. § 85; 4 Bouv. Inst. 157; *Snyder v. Wolfey*, 8 S. & R. 331. "There is no question as to the jurisdiction of equity in cases of lost instruments—where there is a necessity for the proof of the instrument at law, or for giving to the defendant an indemnity, or where there has been a spoliation or fraudulent suppression of the instrument, under which the plaintiff claims." *Cooke v. Darwin*, 23 Eng. L. & Eq. 627. A slave who has been manumitted, and lost her deed of manumission, may have relief in equity. *Alice v. Morté*, 2 Cr. C. C. 485.

² 1 Story's Eq. § 88.

lief on payment of the instalments due with interest and costs; in such case, execution will be stayed, and the judgment be directed to stand subject to the order of the court on the next default.¹

§ 33. So, equity will relieve, when an inequitable loss or injury will otherwise fall upon the plaintiff, from circumstances beyond his control, or from his own acts done in good faith, and in the performance of supposed duty, without negligence. In the execution of mere powers, a court of equity will grant relief, on account of accident as well as mistake, when in consequence of the accident, there is a defective execution of the power. The exercise of this jurisdiction will take place, unless there be some countervailing equity to prevent it, for the relief of purchasers, a wife, a child, or a charity. But equity will not aid defects which are of the very essence or substance of the power; if, for example, the power be executed without the consent of the parties who are required to it, to give it validity; or if it be required to be executed by will and it is executed by deed; the defect cannot, in either case, be relieved from, in equity.²

§ 34. But courts of equity will not relieve a party where he has entered into a positive contract or obligation, and he has been prevented from fulfilling it by accident; or has been in no default, or has been prevented by accident from deriving the full benefit of the contract on his own side. Nor will a party be relieved in equity upon the ground of accident, where the accident has arisen from his own gross negligence or default; or where both parties stand equally innocent, or where they have equal equities. Nor where the party has not a clear vested

¹ Ewart v. Irwin, 7 Leg. Int. 134.

² 4 Bouv. Inst. 157-8; see Evans v. Evans, 21 Eng. L. & Eq. 475; Barber v. Cary, 1 Kern. 397, 402.

right, but his claim rests in mere expectancy, and is not a matter of trust; for example, when a person intending to make a will is prevented from doing so by accident, the intended legatees can have no relief.¹

§ 35. By various acts of assembly, the supreme court, within the city and county of Philadelphia, the district courts of Philadelphia and Allegheny, and the courts of common pleas of the counties of Beaver, Bedford, Berks, Blair, Butler, Cambria, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Fayette, Forest, Huntingdon, Jefferson, Juniata, Lancaster, Lawrence, M'Kean, Mercer, Mifflin, Montgomery, Philadelphia, Potter, Schuylkill, Somerset, Tioga, Union, Venango, Warren, Wayne, and York, are invested with equity powers in all cases over which courts of chancery entertain jurisdiction on the ground of accident.²

§ 36. Certain special statutory remedies have also been provided for the granting of equitable relief, in cases of accident, arising from the loss of instruments. The act 28th March 1786,³ provides relief against the loss of deeds, conveyance and writings relating to lands within this state; but, it seems, that its provisions only extend to cases of loss which happened prior to its passage.⁴ In cases within the act, the party may apply, by bill or petition, to the justices of the supreme court, or to the judges of the proper court of common pleas, setting forth the circumstances of the case, with an affidavit of the material facts. A subpoena is thereupon to issue to any persons who may appear to be interested, if residing within the state. But if the parties interested are non-residents, the court may direct an advertisement to be

¹ 4 Bouv. Inst. 159.

² Purd. Dig. 306-7, 1070-1; P. L. 1855, p. 93.

³ Purd. Dig. 230.

⁴ Smith v. Bonsall, 5 Rawle, 88.

published for three weeks, or more, in such public newspaper as may be published nearest to the court house of the proper county; giving notice of the application, and requiring all persons whom it may concern, to appear in court, in term time, or before the justices thereof, or any two of them, in vacation, at a certain place and time, to make answer upon oath or affirmation to the said bill or petition.

§ 37. When the answer is filed, or in case the parties subpoenaed, or any others, do not attend or answer, in either case, the court, in term time, or the justices thereof, or any two of them, in vacation, may examine such witnesses as may be produced, or cause their depositions to be taken by a commissioner, and have such other proceedings in a summary way, to ascertain and establish the facts of the case, and make such order and decree in the premises, as to justice and equity shall appertain. The record and proceedings, or an exemplification thereof, may be read in evidence upon any trial or controversy respecting the lands in question, and will be deemed sufficient evidence of the facts so decreed and established. These proceedings are to be at the expense of the party exhibiting the bill or petition.

§ 38. The act of 10th April 1849,¹ provides a remedy for the case of a mortgage which has been lost, destroyed, or mislaid, before payment of the mortgage debt. If, in such case, the owner of the mortgaged premises be desirous to pay off the mortgage, and to have satisfaction entered on the record; or the holder of the mortgage be desirous to recover the mortgage debt; in either case, the party may apply, by bill or petition, to

¹ Purd. Dig. 234. This act only applies to the counties of Philadelphia, Montgomery and Lycoming.

the court of common pleas of the county where the mortgaged premises are situate, setting forth the facts of the case, with the complaint or grievance; and, after due notice to the parties interested, to be given in such manner as the court may direct, requiring them to appear on a day certain to answer such bill or petition, the court is authorized to examine into the facts of the case, and to grant such equitable relief, and to make such order and decree therein, as the circumstances of the case may require.

§ 39. In case of the loss of a policy of insurance, the act of 4th March 1850,¹ provides that the party may apply, by petition, to the court of common pleas of the county in which the property has been insured, setting forth the loss or destruction of the policy, with a description of the property, the amount insured, the persons to whom the policy was granted, if practicable, and the mesne transfers thereof. This application must be accompanied with an affidavit of the loss or destruction of the policy, and that a demand for a copy thereof was previously made of the president or authorized agent of the insurance company, with a tender of not less than one dollar for making such copy. The court is, thereupon, required to grant a rule on the corporation that underwrote the policy, commanding them to appear, on a day certain, not less than twenty days from the service of the rule, to show cause why they should not supply a copy of such policy. This rule is to be served by the sheriff, upon the president, secretary, treasurer, or authorized agent of such company. On the return of the rule, upon default of the corporation to appear and show cause why such copy should not be supplied, the court

¹ Purd. Dig. 449.

is required to issue a mandate, commanding them to furnish such copy in ten days after service of the same; and if such mandate shall not be obeyed, on proof of service and of a refusal to furnish such copy, a judgment is to be entered, in favour of the person making the application, against the corporation, for the sum for which the policy was granted; which judgment is to stand for the security of the plaintiff, for such time as the policy itself would have done, and for the like purposes; and the costs of the proceeding are to be paid by the defendant.

§ 40. In case of the loss or destruction of the records of any court of record of this state, a party interested may proceed, by bill in equity, in the court whose record is so lost or destroyed, to perpetuate the evidence thereof; and when proved, such record will have the same legal operation as the original would have had.¹

¹ Purd. Dig. 305.

CHAPTER III.

MISTAKE.

§ 41. THE statutes giving equity jurisdiction to the courts, before enumerated,¹ in cases of accident, have also invested them with similar powers, in all cases over which courts of chancery entertain jurisdiction on the ground of mistake.² This is sometimes the result of accident, in its large sense; but as contradistinguished from it, it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. Mistakes are ordinarily divided into two sorts, mistakes in matter of law, and mistakes in matter of fact.³

§ 42. It is an elementary principle, which applies to civil as well as criminal cases, that ignorance of the law furnishes no excuse to any person, either for a breach or omission of duty. *Ignorantia legis neminem excusat*, is a maxim which is as much respected in equity as in law.⁴ This doctrine is among the settled elements of the law; for every man, at his peril, is bound to take notice of what the law is; as well the law made by statute as the common law.⁵ The presumption is, that every man is acquainted with his own rights, provided he has a

¹ Ante, § 35.

² Purd. Dig. 306-7, 1070-1; P. L. 1855, p. 93.

³ 1 Story's Eq. § 110.

⁴ Robinson v. Cathcart, 2 Cr. C. C. 610.

⁵ Doctor and Student, Dial. ii. ch. 46.

reasonable opportunity to know them. And nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretence that, at the time of parting with it, he was ignorant of the law acting on his title.¹ In Fonblanque, it is laid down as a general proposition, that ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts, in courts of equity;² and Chancellor Kent, in *Lyon v. Richmond*,³ says, the courts (speaking of the courts of chancery) do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of the law. Every man is to be charged, at his peril, with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind.⁴

§ 43. Without this presumption no law could be executed; those who desire to violate it could easily misunderstand it, and ignorance could be feigned where it does not exist. If contracts were binding only on those who know what construction the courts would put on them, very few would stand. No system of jurisprudence could be administered for a year, on this principle, without falling to pieces. All codes, therefore, have adopted the maxim, *Ignorantia legis neminem excusat*. We speak of a mere mistake and not of misapprehension induced by the fraudulent acts of others. Where the party, who commits an error of this kind, is led into it by his adversary, who afterwards seeks to have the ad-

¹ *Storrs v. Barker*, 2 Johns. Ch. 169.

² 1 Fonbl. Eq., B. I. ch. ii. § 7, note v.

³ 2 Johns. Ch. 60.

⁴ *Rankin v. Mortimore*, 7 Watts, 374; *Good v. Herr*, 7 W. & S. 256; *M'Aninch v. Laughlin*, 1 Harris, 371; and see *Magniac v. Thomson*, 2 Wall. Jr. 209.

vantage of it, equity may give relief. So also the rule must be understood as referring to a naked mistake of pure law. In some of the books, "knowledge of one's legal rights," is a phrase used to express that degree of information upon both fact and law, which enables a party to judge how far a demand can be enforced by him, or against him. The relief which equity gives for such ignorance of legal rights, is based on the mistake of fact.¹

§ 44. A very common example of a mistake in law, may be found in the case of an obligee who releases one of two joint obligors, under a mistaken idea that the other would remain bound to him. In such case, the obligee will not be relieved in equity, on the mere ground of mistake of the law; for there is nothing inequitable in the co-obligor, who is not formally released, in availing himself of his legal rights, nor upon the other obligor insisting upon his release, if they both acted *bonâ fide*; indeed it would be against equity to compel one of two joint obligors to pay the whole debt, without having recourse for contribution against the other; and a release to one of them would have that effect, if the other alone remained bound.²

§ 45. The same rule, that mistakes of law will not be relieved against, in equity, generally exists where both parties to a contract commit the mistake, both acting in good faith, when not liable to other objections; thus, where a clause containing a power of redemption, in a deed granting an annuity, after it had been agreed to, was deliberately excluded by the parties, because, being mistaken on the law, they believed it would have ren-

¹ *Light v. Light*, 9 Harris, 412.

² 4 Bouv. Inst. 160-1.

dered the contract usurious, the court refused relief.¹ The reason for this is obvious, the parties had deliberately agreed upon one contract, and excluded that provision, and the court could not make another, by restoring it.²

§ 46. And where, upon a loan of money, for which security was to be given, the parties deliberately took, after consultation with counsel, a letter of attorney, with a power to sell the property (ships) in case of non-payment of the money, instead of a mortgage upon the property itself, upon the mistake of the law, that the security by the former instrument would, in case of death or other accident, bind the property equally as strongly as a mortgage. The debtor died, and his estate being insolvent, a bill in equity was brought by the creditor against the administrators, to reform the instrument, or to give him a priority, by way of lien on the property, in exclusion of the general creditors. But the court denied relief, upon the ground that the agreement was for a particular security selected by the parties, and not for security generally; and that they were asked to substitute another security, not upon any mistake of fact, but upon a mistake of law, when such security was not within the scope of the agreement.³

§ 47. It not unfrequently happens that cases of surprise are mixed up with mistakes of law. By surprise is here meant, the act by which a party who is entering into a contract is taken unawares, by which sudden confusion or perplexity is created. From the effects of contracts made under such circumstances, courts of equity

¹ *Irnham v. Child*, 1 Bro. C. R. 92.

² 4 Bouv. Inst. 161.

³ *Hunt v. Rousmaniere*, 8 Wheat. 174; 1 Story's Eq. § 114; *Leavitt v. Palmer*, 3 Comst. 38-9.

will relieve, because the agreements or acts are unadvised, improvident, and without due deliberation; it being a rule with those courts, to protect those who are unable to protect themselves, and of whom some undue advantage has been taken. In these cases, it is not for the mistake in law, but for the circumstances which have caused the error, that the contract is set aside.¹ The reason for setting aside a contract, where both parties have been taken by surprise, is still stronger, because neither party gave a valid consent.²

§ 48. In regard to the other class of mistakes, those of fact, the general rule is, that when an act is done, or contract made, under a mistake or ignorance of a material fact, it is voidable, and relievable in equity.³ No person can be presumed to be acquainted with all matters of fact, nor is it possible, by any degree of vigilance, in all cases to acquire that knowledge; and for this reason a court of equity is liberal in granting relief to prevent injustice, where the party asking it cannot be charged with culpable negligence.⁴ The rule applies not only to cases where there has been studied suppression or concealment of facts by the one side, which would amount to fraud, but also to many cases of innocent ignorance and mistake on both sides. It is true, that it is not every mistake which will enable the party to avoid the contract;

¹ In *Cummings' Appeal*, Justice Lowrie says—"We do not forget the rule that refuses to hear the allegation of ignorance of law as a ground of relief; but we must be very cautious in applying this rule to judicial proceedings; for the whole doctrine of amendments proceeds upon a partial denial of it, and it is not at all of absolute obligation in questions of new trial." And, accordingly, a judicial sale may be set aside because of a mistake of the purchaser in relation to his legal right in the proceeds. *Pittsburgh Leg. J.* 23 Sept. 1854.

² 4 *Bouv. Inst.* 162; and see *Hunt v. Moore*, 2 *Barr*, 105; *Sears v. Shafer*, 2 *Seld.* 268.

³ *Miles v. Stevens*, 3 *Barr*, 37.

⁴ *Jenks v. Fritz*, 7 *W. & S.* 203.

for, to have this effect, it must be of its essence, the *sine qua non* of the contract; or, as it is expressed, the efficient cause of concoction.¹

§ 49. In cases of mutual mistake going to the essence of the contract, it is by no means necessary that there should be any presumption of fraud; on the contrary, equity will often relieve, however innocent the parties may be. Thus, if one person should sell a messuage to another, which was, at the time, swept away by a flood, or destroyed by fire, or an earthquake, a court of equity would relieve the purchaser, upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract.² The same principle will apply to cases of purchases, where the parties have been innocently misled as to the extent of the thing sold. Thus, where a vendor and vendee of land appointed a skilful surveyor to ascertain the number of acres in the tract, which was sold by the acre, and upon his report the deed was executed and delivered, and bonds given for the purchase money, it was held, that equity would relieve against a mistake of the surveyor in measuring the land.³ Where one of two parties, equally innocent, must suffer by a mistake, he who made it must take the consequence.⁴

§ 50. One of the most common class of cases, in which relief is sought in equity on the ground of mistake, is that of written agreements. Sometimes the written agreement contains less than the parties intended;

¹ *Miles v. Stevens*, 3 Barr, 37; *Gieger v. Cook*, 3 W. & S. 270; *Bellas v. Hays*, 5 S. & R. 427; *Horbách v. Gray*, 8 Watts, 497; *Faure v. Martin*, 3 Seld. 218-19.

² 1 Story's Eq. § 142.

³ *Jenks v. Fritz*, 7 W. & S. 201.

⁴ *Finley v. Aiken*, Black, J., 3 Pittsburgh Leg. J. 4.

sometimes more; and sometimes the intent is not expressed in the terms intended by the parties. In all such cases, if the mistake be clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties.¹ If, for instance, property has been conveyed through mistake by deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee could not in good conscience retain, a court of chancery will interfere and correct that mistake, whether it arose from a misapprehension of the facts or of the legal operation of the deed. But where the conveyance was such as the parties intended it should be, and the grantee may in good conscience retain the property, although the grantor may have been mistaken as to the extent of his title, a court of chancery will generally refuse its interference.² And so, if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief.³

§ 51. A mistake in any instrument may be corrected, in equity, when it clearly appears, from satisfactory evidence, that it was reduced to writing in terms not conformable to the real intent of the parties; such as the omission of the scrivener to insert a material part of the agreement;⁴ or, where a particular clause has been in-

¹ 1 Story's Eq. § 152; *Rearich v. Swinehart*, 1 Jones, 238; *Blakeslee v. Blakeslee*, 10 Harris, 244.

² *Stedwell v. Anderson*, 21 Conn. 139; *Hurst's Lessee v. Kirkbride*, 1 Yeates, 139; s. c. 1 Binn. 616; *Dinkle v. Marshall*, 3 Binn. 587; *Bowman v. Bittenbender*, 4 Watts, 290; *Insurance Co. of N. America v. Union Canal Co.*, Bright. R. 48; *Blakeslee v. Blakeslee*, 10 Harris, 244.

³ *Rogers v. Smith*, 4 Barr, 93; *Zentmyer v. Mittower*, 5 Barr, 409; *Stine v. Sherk*, 1 W. & S. 195; *Moser v. Libenguth*, 2 Rawle, 430.

⁴ *Gower v. Sterner*, 2 Wh. 79; *Moliere v. Penn. Fire Ins. Co.*, 5 Rawle, 347.

serted by mistake;¹ and parol evidence is admissible to prove the mistake, though it be denied in the answer.² But it is not sufficient that there is a mistake as to the legal consequences of the instrument; for to admit correction on this ground would be indirectly to construe it by extrinsic evidence, and the proper question is, not what the document was intended to mean, or how it was intended to operate, but what it was intended to be. It is indispensable to the relief, that the mistake should have arisen from some cause distinct from the sense of the instrument. A mistake, which is nothing more than a misconception of the law, is no ground for relief in equity.³

§ 52. In cases of asserted mistake in written contracts, where the mistake is to be established by parol evidence, the question has often been mooted, how far a court of equity ought to be active in granting relief, by a specific performance, in favour of the party seeking to reform the contract upon such parol evidence, and to obtain performance of it when it shall stand reformed. A strong inclination of opinion, has been repeatedly expressed by the English courts, not to decree a specific performance, in such cases.⁴ But Chancellor Kent, after a most elaborate consideration of the subject, has not hesitated to decree relief to a plaintiff standing in this precise predicament.⁵ And it would seem that, in Pennsylvania, such an agreement would

¹ *Hamilton v. Asslin*, 14 S. & R. 448.

² *Wall v. Arrington*, 2 Am. L. R. 381.

³ *Sims v. Lyle*, 4 W. C. C. 320; *Insurance Co. v. Union Canal Co.*, Bright. R. 53; *Tilghman v. Tilghman*, 1 Bald. 490; *Tilghman's Estate*, 5 Wh. 63; *Faure v. Martin*, 3 Seld. 219.

⁴ 2 Leading Cases in Equity, 540.

⁵ *Gillespie v. Moon*, 2 Johns. Ch. 585; *Keisselbrock v. Livingston*, 4 Ibid. 144.

be enforced; for it is well settled in this state that verbal stipulations by one party to a written agreement, on the faith of which it is executed by the other, will control the writing, even when there is no evidence that they were made with a fraudulent design.¹ Where suit is brought on a bond or other instrument, it is the constant practice to allow defendants to protect their interests, by proof of a mistake in reducing the agreement to writing; and it is difficult to perceive why plaintiffs may not avail themselves of the same right. We consider that as done which ought to have been done; and hence, an action of covenant will lie on articles as amended by parol evidence.²

§ 53. There is another class of cases in which courts of equity will grant relief on the ground of mistake. When a person having a power, by mistake neglects, in the execution of it, any requisite act, or does not strictly conform with the authority entrusted to him, his endeavour is either wholly or partially ineffectual at law. In equity, however, the defect under certain circumstances will be supplied, or such relief will be given, as appears consistent with the intention of the party, and the justice of the case. But although it will be found that the court will go very far in affording relief where an effectual execution has been attempted, it will not interpose to enforce the execution of such an authority, where nothing has been done in exercise of it; nor where there are counter equities in other persons. Upon examination of the authorities on this subject, it will appear that relief, in cases of defective execution of powers, is for

¹ *Christ v. Diffenbach*, 1 S. & R. 464; *Miller v. Henderson*, 10 Ibid. 292; *Hultz v. Wright*, 16 Ibid. 345; *Clark v. Partridge*, 2 Barr, 13; *Partridge v. Clarke*, 4 Ibid. 166.

² *Gower v. Sterner*, 2 Wh. 79-80; *Partridge v. Clarke*, 4 Barr, 167-8.

the most part given, where, in consequence of particular relations subsisting between the parties, one of them is thought to have, in natural justice, a peculiar claim to satisfaction. Thus, if execution of the power were attempted in favour of a purchaser for a valuable consideration, a creditor, a wife, or a legitimate child, whether the instrument of appointment was executed before or after marriage, the court would supply defects therein.¹

¹ Jeremy's Eq. 371-2.

CHAPTER IV.

ACTUAL FRAUD.

§ 54. THE third class of cases, in which courts of equity will grant relief concurrently with courts of law, are those of fraud. In a great variety of cases fraud is remediable, and effectually remediable, at law. But there are many cases in which courts of law can grant no relief; and courts of equity, in relieving against it, often go, not only beyond, but even contrary to the rules of law, and, with the exception of cases of fraud in obtaining a will, in which the remedy is exclusively at law, courts of equity may be said to possess a general, and, perhaps, a universal concurrent jurisdiction with courts of law, in cases of fraud cognizable in the latter; and exclusive jurisdiction in cases of fraud beyond the reach of the courts of law.¹ By our statutes, equity jurisdiction has been conferred on the courts, before enumerated,² in all cases of fraud, whether actual or constructive.

§ 55. Fraud has been defined to be any trick or arti-

¹ 1 Story's Eq. § 184. Thus, where two of the creditors of an insolvent firm, combined to defraud them and their other creditors, by inducing them to make a sale of the firm property for cash; their object being to get possession of the property, and to pay for it, not in cash, but in the notes of the insolvents; it was held, that although such fraud might be cognizable at law, yet a court of equity would not refuse its aid to grant relief, the more especially, since a discovery might be necessary to prove the complicity of some of the guilty parties. *Gray v. Simon*, 12 Leg. Int. 72.

² Ante, § 35.

fice employed by one person to induce another to fall into an error, or to detain him in it, so that he may make an agreement contrary to his interest. The fraud consists either first, in a misrepresentation, or secondly, in the concealment of a material fact. It has been defined, in other words, to be any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. But, fraud, in the sense in which it is understood in a court of equity, includes not only all the class of positive frauds, such as the definition includes, but many others. In equity, all acts, omissions, and concealments, which involve a breach of legal or equitable obligation or duty, trust or confidence, justly reposed, and which are injurious to another, or by which an undue and unconscious advantage is taken of another, are considered fraudulent.¹

§ 56. Lord Hardwicke has enumerated four species of fraud.² Fraud which may arise from facts and circumstances of imposition; from the circumstances and condition of the parties; from the intrinsic nature and subject of the bargain; or from imposition and deceit in persons not parties to the transaction.³ Fraud, then, being so various in its nature, and so extensive in its application to human concerns, it would be difficult to enumerate all the instances in which courts of equity will grant relief under this head. It will be sufficient, if we here collect some of the more marked classes of cases, in which the principles which regulate the action of courts of equity are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances.⁴

¹ 4 Bouv. Inst. 167.

² *Chesterfield v. Janssen*, 2 Ves. 155.

³ *Jeremy's Eq.* 385; *Bokee v. Walker*, 2 Harris, 142.

⁴ 1 *Story's Eq.* § 189.

✓ § 57. It may here be proper to observe, that courts of equity do not restrict themselves by the same rigid rules as courts of law do, in the investigation of fraud, and in the evidence and proof required to establish it. It is equally a rule in courts of law and courts of equity, that fraud is not to be presumed; it must be established by proofs. But courts of equity will act upon circumstances, as presumptions of fraud, where courts of law would not deem them satisfactory proofs.¹ A party cannot, however, avail himself in equity, of evidence tending to prove a transaction fraudulent, where no charge of fraud is con-

¹ Ibid. § 190; *Kaine v. Weigley*, 10 Harris, 179; in this case Chief Justice Black observes, that "the proposition that fraud must be proved, and is never to be presumed, is frequently urged at the bar, and sometimes assented to by judges, as if it were a fundamental maxim of the law, invariably true, incapable of modification, and open to no exception; whereas, it has scarcely extent enough to give it the dignity of a general rule; and, as far as it does go, it is based on a principle which has no more application to frauds than to any other subject of judicial inquiry. It amounts but to this; that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial. It is not true that fraud can *never* be presumed. Presumptions are of two kinds, *legal* and *natural*. Allegations of fraud are sometimes supported by one and sometimes by the other; and are seldom, almost never, sustained by that direct and plenary proof which excludes all presumption. A sale of chattels without delivery, or a conveyance of land without consideration, is conclusively presumed to be fraudulent as against creditors, not only without proof of any dishonest intent, but in opposition to most convincing evidence that the motives and objects of the parties were fair. This is an example of fraud established by mere presumption of law. A natural presumption, is the deduction of one fact from another. For instance, a person deeply indebted, and on the eve of bankruptcy, makes over his property to a near relative, who is known not to have the means of paying for it. From these facts, a jury may infer the fact of a fraudulent intent to hinder and delay creditors. A presumption of fraud is thus created, which the party who denies it must repel by clear evidence, or else stand convicted. Where creditors are about to be cheated, it is very uncommon for the perpetrators to proclaim their purpose and call in witnesses to see it done. A resort to presumptive evidence, therefore, becomes absolutely necessary to protect the rights of honest men from this, as from other invasions." 10 Harris, 183.

tained in the pleadings.¹ And where an account is sought on the ground of fraud, it is not sufficient to make such a charge in general terms; but it should be pointed, and state particular acts of fraud.² And it is now an established doctrine of courts of equity, that when a bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree, by establishing some one or more of the facts quite independent of the fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated.³

§ 58. It is obviously a principle of moral conduct, that a man should be just and candid in his dealings; and, therefore, where, on the contrary, one seeks by misrepresentation, or even by improper concealment of facts, in the course of a transaction, to mislead the judgment of another to his prejudice, a court of equity will generally interfere. The two means of injury, here adverted to, are, in more technical language, denominated the *suggestio falsi*, and *suppressio veri*.⁴ To authorize a court of equity to rescind a contract on the ground of misrepresentation, it is not only necessary to establish the fact, that a misrepresentation was made but that it is a matter of substance or important to the interests of the other party, and that it has actually misled him.⁵ For if the misrepresentation was of a trifling or immaterial thing; or if

¹ Chautauque Co. Bank v. White, 2 Seld. 237; Gouverneur v. Elmendorf, 5 Johns. Ch. 79; Fitzpatrick v. Beatty, 1 Gilm. 454.

² Palmer v. Moore, 2 Dick. 489.

³ Price v. Berrington, 7 Eng. L. & Eq. 260; Booth v. Booth, 3 Litt. 57; Mount Vernon Bank v. Stone, 2 Rh. I. R. 129; s. c. 1 Am. L. R. 339.

⁴ Jeremy's Eq. 385.

⁵ 4 Bouv. Inst. 169; Swazey v. Herr, 1 Jones, 279.

the other party did not trust to it, or was not misled by it; or if it was vague and inconclusive in its own nature; or if it was upon a matter of opinion or fact, equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other; in these and the like cases, there is no reason for a court of equity to interfere, to grant relief upon the ground of fraud.¹

§ 59. It is wholly immaterial whether one who misrepresents a material fact, knew it to be false, or made the assertion not knowing whether it was true or false. If one assert a fact, of which he knows and believes nothing, he is guilty of falsehood, and must bear all the consequences produced by it. If a party make representations which he knows to be false, and injury ensue, though the motive may not be bad, he commits legal fraud. No motive for a representation which is false, and may be injurious, can be good; it is enough to stamp it with the character of actual fraud that it may lead to a risk, which the other party would otherwise shun.² And even if a party innocently misrepresent a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party.³

§ 60. Thus, if the seller falsely represent the quality or character of the commodity to be other than it is in fact, he will be liable to an action for deceit, or may be defeated in a suit brought for the purchase money, if it appear that the purchaser, not enjoying equal means of knowledge, trusted to such representations. This is especially so, where the thing sold is affirmed by the ven-

¹ 1 Story's Eq. § 191.

² *Bokee v. Walker*, 2 Harris, 142.

³ *Pearson v. Morgan*, 2 Bro. C. R. 389; *Coleman v. Rowland*, 11 Leg. Int. 146; *Tyson v. Passmore*, 2 Barr, 124; *Hunt v. Moore*, 2 Barr, 108; 1 Pars. on Contr. 451.

dor to be, in specie, the thing bargained for, when in truth it is something in its nature essentially different; and it will matter nothing that the article has been inspected and received by the buyer, if its true character be not easily ascertainable by such means, short of analytical experiment, as only indolence or folly would omit.¹

§ 61. A party practised upon by actual misrepresentation will, if possible, be secured from the injury which may arise therefrom. And hence a court of equity would interfere to protect a person induced to sell property at an undervalue, upon a false statement that the benefit of the purchase was for one whom he knew the vendor wished to oblige;² and to relieve a party who should agree with another to purchase from him a term, which the latter pretended would not expire for a long period of time, but which it turned out had but a few years to run. And if one should misstate a fact, of which, in law, he is presumed to have notice, and might readily have obtained information, he is held to be bound thereby.³ Where there has been a gross misrepresentation of fact, leading to contract, the fraud practised will so utterly avoid it, that it is not even susceptible of confirmation, without a new consideration.⁴

¹ *Cornelius v. Molloy*, 7 Barr, 297; *Borrekins v. Bevan*, 3 Rawle, 23.

² *M'Caskey v. Graff*, Pittsburgh Leg. J. 22 July, 1854.

³ Jer. Eq. 386. Where a mortgage does not cover all of the premises owned by the mortgagor which he, by false and fraudulent representations, induced the mortgagee to believe were included therein, when the latter made a loan, and accepted it as security therefor, a court of equity will, as against the mortgagor, or his voluntary grantee, reform the mortgage, and enforce it against the part of the premises not originally embraced therein. *De Peyster v. Hasbrouck*, 1 Kern. 582.

⁴ *Cochran v. Cummings*, 4 Dall. 250; *Duncan v. McCullough*, 4 S. & R. 487; *Chamberlain v. McClurg*, 8 W. & S. 36; *Goepp's Appeal*, 3 Harris, 428.

§ 62. An unlawful concealment of the truth, or *suppressio veri*, when, from it, an injury arises to the opposite party, is a just cause for setting aside a contract in equity. But the concealment must be such, to render it unlawful, that the party concealing is bound to disclose the fact to the other, and in respect to which he cannot innocently be silent. There are many duties, that belong to the class of imperfect obligations, which are binding on conscience, but which human laws do not and cannot undertake directly to enforce. But when the aid of a court of equity is sought, to carry into execution such a contract, then the principles of ethics have a more extensive sway, and a purchase made with such a reservation of superior knowledge, would be of too sharp a character to be aided and forwarded in its execution by the powers of a court of chancery. It is a rule in equity, that all the material facts must be known to both parties, to render the agreement fair and just in all its parts; and it is against all the principles of equity, that one party, knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for a specific performance.¹

§ 63. There are certain intrinsic circumstances which form the very ingredient of the contract, such as belong to its nature, character, condition, title, and the like. These are of the essence of the contract; as that a horse you are selling is alive; that a house in a distant town, which you sell to another, is not burned down. If, knowing the fact, that at the time of sale the horse was dead, or the house destroyed by fire, the seller should conceal such important fact, the sale could be avoided.²

¹ 2 Kent. Com. 490-1; see Case v. Cushman, 3 W. & S. 546.

² 4 Bouv. Inst. 173; 1 Pars. on Contr. 437, 461-2, n.

§ 64. In regard to extrinsic circumstances, such as facts respecting the occurrence of peace and war, the rise or fall of markets, the character of the neighbourhood, the increase or diminution of duties, and the like, the rule of the common law is, *caveat emptor*; and courts of equity have adopted the same maxim to a large extent, and relax its application only when there are circumstances of peculiar trust, or confidence, or relation, between the parties.¹ If, for example, I treat for the purchase of an estate, knowing that there is a mine under it, and the other party make no inquiry, I am not bound by law to inform him of the mine.² Where the means of knowledge is equally accessible to both parties each must judge for himself.

§ 65. There are, however, cases of a different character, where the contract is necessarily based on the assumption of a full disclosure; and where, for that reason, any degree of concealment on a material point is fraud. Thus, if a contract is guarantied by a surety, and a fact materially affecting the nature of that contract is misrepresented to him, or concealed from him, with the knowledge or consent of the party accepting the guarantee, the surety ceases to be liable.³ And if a creditor, knowing that his debtor is in failing circumstances, take from him, for part of his claim, a mortgage substantially covering all his property, and get the debtor to obtain the endorsement of a third person for another part, without revealing the fact of the mortgage, this is a fraud upon the endorser and discharges him from liability.⁴ He acts fraudulently who secretly

¹ 1 Story's Eq. §§ 210, 212, 213; *Laidlaw v. Organ*, 2 Wheat. 178.

² *Adams' Eq.* 178; *Kintzing v. M'Elrath*, 5 Barr, 467, 470.

³ *Pidcock v. Bishop*, 3 B. & C. 605.

⁴ *Lancaster Co. Bank v. Albright*, 9 Harris, 228.

changes a state of affairs, and then procures another to do an act, into which the true state of affairs enters as a motive.¹

§ 66. The principle which treats non-disclosure as equivalent to fraud, when the circumstances impose a duty that the disclosure should be made, is especially material in respect to contracts of insurance. For the risk which the insurer undertakes can only be learnt from the representation of the party insured. If, therefore, the insured do not state to the insurer truly and fully all the facts within his private knowledge, which would vary materially the object of the policy and change the risk understood to be run, the policy is void. Nor is it an excuse that the concealment was attributable to the fraud or neglect of an agent, or that the account concealed was false, or in no way referred to the subsequent cause of loss, or was not believed by the insurer to be material, or was not concealed with a fraudulent design. Thus, where the interest to be secured by the policy was described as a mortgage including land, it was held to be a material fact that the land was subject to prior mortgages held by the insured, the concealment of which vitiated the policy.²

§ 67. The same principle applies to all cases in which the party is under an obligation to make a disclosure, and conceals material facts. Thus, a secret agreement by a creditor, party to a composition deed, by which he is to receive a sum over and above the dividend stipu-

¹ Ibid. 9 Harris, 231.

² *Smith v. Columbia Ins. Co.*, 5 Harris, 253; and see *Vale v. Phoenix Ins. Co.*, 1 W. C. C. 283; *Biays v. Union Ins. Co.*, Ibid. 506; *Marshall v. Union Ins. Co.*, 2 Ibid. 357; *Susquehanna Ins. Co. v. Perrine*, 7 W. & S. 348; *Wilson v. Herkimer Co. Mutual Ins. Co.*, 2 Seld. 53; *Hartman v. Keystone Ins. Co.*, 9 Harris, 466; *Ins. Co. v. Updegraff*, Ibid. 513.

lated for in the deed, is void; and it is immaterial that all the other creditors had executed the deed before such creditor agreed to become a party, on receiving a security for the additional sum.¹ All such secret arrangements are utterly void; they cannot be enforced even against the debtor himself, and money paid under them may be recovered back, as having been obtained against the clear principles of public policy.² But where each creditor is separately compounded with, this principle of mutuality and equality does not apply. Each creditor has a right to make his own bargain with his debtor; and one bargain cannot be void because it is better than another.³

§ 68. When the parties stand in a fiduciary relation, the utmost degree of good faith is required in making contracts with each other, and the misrepresentation or concealment of any material fact, will induce courts of equity to pronounce such transactions void, and to make a decree restoring the parties to their original rights, so far as it can be done. Thus if, upon the dissolution of a partnership, one of the firm, whose exclusive business it was to keep the books and superintend the accounts of the concern, should assign all his interest in the effects for a valuable consideration, and take a covenant of indemnity against all debts due by the firm; such indemnity would not cover a debt which did not appear in the partnership books, and was not made known to the assignee at the time of the contract of indemnity.⁴

§ 69. In this class of cases of actual fraud may pro-

¹ *Patterson v. Boehm*, 4 Barr, 507.

² *Jackman v. Mitchell*, 13 Ves. 581; *Sadler v. Jackson*, 15 Ves. 52; *Steinman v. Magnus*, 11 East, 390.

³ *White v. Clarke*, 5 Cr. C. C. 111; see *Smith v. Saltzman*, 25 Eng. L. & Eq. 476-8.

⁴ *Case v. Cushman*, 3 W. & S. 544.

perly be included those of unconscionable bargains, obtained by imposition, circumvention, surprise, and undue influence, over persons in general; and in an especial manner, all unconscientious advantages or bargains, obtained over persons disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity, from taking due care of, or protecting their own rights and interests.¹ For, though every one is allowed to dispose of his property as he pleases, when he has the free use of his understanding, and in this respect courts of equity have no right to interfere, yet, when from the state of mind, or other particular circumstance, in which the party is placed, he is induced to act contrary to his own interest, or that of his representatives, he will be protected from those who have thus circumvented him.²

§ 70. It is upon the ground, that there is a want of rational and deliberate consent, that the contracts of idiots, lunatics, and other persons, *non compotes mentis*, are generally deemed to be invalid in courts of equity. It was formerly held, according to a known maxim of the common law, that no man of full age should be admitted to disable or stultify himself; and that a court of equity could not relieve against a maxim of the common law.³ But this doctrine of the common lawyers has ceased to be the reproach of a system, whose claim to be the perfection of reason could not but be equivocal, while such a moral anomaly retained its place as a fundamental principle. And it is now established, both at law and in equity, that a man may allege his own incompetency to avoid his deed.⁴

¹ 1 Story's Eq. § 221.

² 4 Bouv. Inst. 175.

³ 2 Kent's Com. 451.

⁴ Clifton v. Davis, 1 Pars. 36; Bensell v. Chancellor, 5 Wh. 377; Rogers v. Walker, 6 Barr, 374.

§ 71. The ground upon which courts of equity interfere to set aside the contracts of lunatics, and others *non compos mentis*, is fraud. Wherever, from the nature of the transaction, there is not evidence of entire good faith, or the contract or other act is not seen to be just in itself, courts of equity will set it aside, or make it subservient to their just rights and interests.¹ Where, indeed, a contract is entered into in good faith, and is for the benefit of such persons, as for necessities, courts of equity will uphold it. Ever since the case of *Stiles v. West*,² it has been held that the executed contract of a *non compos mentis* for necessities, *bonâ fide* supplied, stands on the footing of an infant's contract for necessities.³ And so, an executed contract, by a merchant, for the purchase of goods, before the day from which the inquest finds him to have been *non compos*, cannot be avoided by proof of insanity, at the time of the purchase, unless there has been a fraud committed on him by the vendor, or he had knowledge of his condition.⁴

§ 72. Drunkenness rests on the same footing with insanity, where the extent of the former is such as to induce the deprivation of reason and understanding.⁵ In *Cooke v. Clayworth*,⁶ Sir William Grant observes, "as to that extreme state of intoxication that deprives a man of his reason, I apprehend, that even at law it would invalidate a deed obtained from him while in that condition." The absence of capacity for any deliberate

¹ 1 Story's Eq. § 227-8.

² Cited in *Manby v. Scott*, 1 Sid. 109.

³ *La Rue v. Gilkyson*, 4 Barr, 376; *Baxter v. Earl of Portsmouth*, 2 Car. & P. 178, s. c. 5 B. & C. 170.

⁴ *Beals v. See*, 10 Barr, 56.

⁵ *Clifton v. Davis*, 1 Pars. 36; 2 Kent's Com. 451.

⁶ 18 Ves. 12.

consent, alike applies to both conditions, and in both furnishes the reason for the invalidity of the contracts of lunatics, and the helpless, stolid and stupified drunkard. This is also the doctrine of the civilians. "It is evident," says Pothier, "that drunkenness, when it goes so far as absolutely to destroy the reason, renders a person in this state, so long as it continues, incapable of contracting, since it renders him incapable of consent."¹ If the degree of intoxication fall short of this, a court of equity will generally not assist the other party in enforcing his claim. But, it seems, that it will confine itself to standing neuter, and will not relieve against the instrument, unless the contracting party was drawn in to drink by the contrivance of the other.²

§ 73. Imbecility of mind is not sufficient to set aside a contract when there is not an essential privation of the reasoning faculties, or an incapacity of understanding and acting with discretion in the ordinary affairs of life. This incapacity is now the test of that unsoundness of mind which will avoid a deed at law. The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; and if the party be *compos mentis*, the mere weakness of his mental powers does not incapacitate him. Weakness of understanding may, however, be a material circumstance in establishing an inference of unfair practice, or imposition, and it will naturally awaken the attention of a court of justice to every unfavourable appearance in the case.³

¹ Pothier Traité des Oblig. n. 49; 1 Pars. on Contr. 310-12 *in notis*.

² Adams' Eq. 183; 2 Sugd. on Powers, 178.

³ 2 Kent's Com. 452; Adams' Eq. 183. Although in equity a contract made with a man of sound mind, will not be set aside, merely because it is a bad bargain, rash and improvident, yet, if it be made with a person of weak under-

§ 74. If an act be done under actual duress, it may be afterwards avoided even at law; for instance, if a man be induced to execute a deed through fear of death, or mayhem, or by an illegal restraint of his liberty. And, in such case, though its execution be accompanied by all requisite solemnities, yet he may allege the duress and avoid the extorted deed. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seal a deed, this is not duress of imprisonment, and he is not at liberty to avoid it. To constitute duress at law, the arrest must have been originally illegal, or have become so by subsequent abuse of it.¹ Courts of equity will likewise set aside a contract made under the influence of terror, or of threats, or of apprehensions short of duress; for in such cases a party has no free will; and the rule in equity is, that where a party is not a free agent, and is not equal to protecting himself, the court will protect him. Circumstances also, of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency as to justify the court in setting aside a contract made by him, on account of some oppression, or fraudulent advantage, or imposition, attendant on it.²

§ 75. The acts and contracts of infants are treated as falling within the like predicament; for they are considered as having no capacity to bind themselves, from the want of sufficient reason, and discernment of under-

standing, there does arise a natural inference that it was obtained by fraud, or circumvention, or undue influence. *Ferris v. Henderson*, 2 Jones, 55, 1 Fonbl. Eq. b. I. c. ii. § 3. As to the capacity necessary for the valid execution of a will, see 1 Yeates, 114; 7 S. & R. 95; 8 Ibid. 573; 10 Ibid. 81; 17 Ibid. 447; 3 W. C. C. 586; 4 Ibid. 267-8; 9 Harris, 69-72.

¹ *Stauffer v. Latshaw*, 2 Watts, 167; *Winder v. Smith*, 6 W. & S. 429.

² 1 Story's Eq. § 239; 1 Pars. on Contr. 319.

standing. There are indeed certain excepted cases, but they are all of a special nature. The rule of law is, that no one may deal with an infant; the exception to it is, that a stranger may supply him with necessaries proper for him, in default of supply by any one else; but his interference with what is properly the guardian's business must rest on an actual necessity, of which he must judge, in a measure, at his peril.¹ So, by statute, an infant may enter into a contract of apprenticeship. When an infant's contract is, in its nature, beneficial to him, it binds him in infancy and at age; when prejudicial, it is absolutely void from the beginning.² Thus, a warrant of attorney executed by an infant is absolutely void, no matter under what circumstances it may have been given; and a bill in equity will lie, to restrain proceedings on a judgment entered by virtue of it.³

§ 76. In regard to *femes covert*, the rule of law is, that they have no capacity to do any acts or to enter into any contracts, and such acts and contracts are treated as mere nullities. So absolutely void is the deed or bond of a married woman in contemplation of law, that her coverture, at the time of its execution, may be given in evidence, for the purpose of showing that it is so, either under the plea of *non est factum*, or it may be pleaded specially, without being obnoxious to the objection that it amounts to the general issue, and therefore is not good.⁴ But courts of equity have broken in upon this

¹ *Johnson v. Lines*, 6 W. & S. 82.

² *Leech v. Agnew*, 7 Barr, 22.

³ *Knox v. Flack*, 10 Harris, 338-9. See 1 Pars. on Contr. 243. As a general rule, the contract of an infant, is said to be not void, but voidable; that is, not so far void, that he cannot ratify it after he arrives at the age of legal majority. Pars. on Contr. 244; 1 Am. Lead. Cas. 103-4.

⁴ *Dorrance v. Scott*, 3 Wh. 313; *Caldwell v. Walters*, 6 Harris, 82; *Knox v. Flack*, 10 Harris, 338.

doctrine; and have, in many respects, treated the wife as capable of disposing of her own separate property, and of doing other acts, as if she were a *feme sole*. The English rule gives her the entire control of her separate property, so far as her power has not been restricted by the terms of the settlement, but in this state, we hold that she has no power which is not given her, either expressly or by necessary implication.¹ The act of 1848, however, has worked a radical and thorough change in the condition of a *feme covert*. Since the passage of that act, a married woman must be considered a *feme sole* in regard to any estate, of whatever name or sort, owned by her before marriage, or which shall come to her during coverture, by will, descent, deed of conveyance, or otherwise. She may dispose of her separate estate, by will, or otherwise, as a *feme sole*.² But this act does not enable her to enter into a personal obligation for the payment of money, such as a promissory note,³ or a bond and warrant of attorney;⁴ unless such obligation be given for the purchase money of real estate for her separate use.⁵ She may, however, in a mortgage of her separate estate for the debt of her husband, waive the limitation given by the act of 1705.⁶ In cases of this sort the same principles will apply to the acts and contracts of a *feme covert*, as would apply to her as a *feme sole*, unless the cir-

¹ *Chrisman v. Wagoner*, 9 Barr, 473; *Lancaster v. Dolan*, 1 Rawle, 247; *Thomas v. Folwell*, 2 Wh. 11; *Wallace v. Coston*, 9 Watts, 137; *Cochran v. O'Hern*, 4 W. & S. 100; *Wetherill v. Mecke*, Bright. R. 140-1.

² *Cummings' Appeal*, 1 Jones, 275; *Goodyear v. Rumbaugh*, 1 Harris, 480.

³ *Mahon v. Gormly*, Pittsburgh Leg. J. 10 February 1855.

⁴ *Caldwell v. Walters*, 6 Harris, 82; *Knox v. Flack*, 10 Harris, 338; and see *Bennet v. Smith*, 3 Am. L. J. 138.

⁵ *Patterson v. Robinson*, 3 Am. L. R. 210.

⁶ *Galway v. Black*, Pittsburgh Leg. J. 6 May 1854; *Ibid.* 11 Nov. 1854.

cumstances give rise to the presumption of fraud, imposition, unconscionable advantage, or undue influence.¹

§ 77. Of a kindred nature to the cases already considered, are cases of bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence. By unconscionable bargains are meant those contracts which no man in his senses, not under delusion, would make, on the one hand, and which no honest and fair man would accept on the other. A bargain will not be considered unconscionable for the mere inadequacy of price, or any other inequality in the bargain, because, whether the price be inadequate depends upon numerous circumstances, which cannot be considered by the courts, without setting afloat all contracts, and rendering every thing uncertain. But the inadequacy may be so unconscionable as to shock the conscience, and be evidence sufficient to demonstrate some gross imposition, or undue and unfair influence, which may be considered a fraud.² Still there are cases in which equity will not relieve even when there has been gross inadequacy, unless the parties can be placed *in statu quo*. In cases of marriage settlements, for example, the courts cannot unmarry the parties, and therefore they will not interfere.³ A court of equity will not, however, decree specific performance of a contract, where the price is unreasonable or inadequate, or the contract is in other respects inequitable; in such case equity will not assist either party.⁴

¹ 1 Story's Eq. § 243. If fraud has been practised to obtain the acknowledgment of a *feme covert* to a deed, barring her right of dower in lands conveyed by her husband, a court of equity will grant relief; for no separate examination can guard against that. *Schrader v. Decker*, 9 Barr, 16.

² *Vint v. King*, 2 Am. L. R. 732; see *Davidson v. Little*, 10 Harris, 252.

³ 4 Bouv. Inst. 175.

⁴ *Davidson v. Little*, 10 Harris, 251.

But this principle, in practice, has not been extended to any sale, unless where there has been inadequacy or extravagance in the sum agreed upon, comparing it with the usual current price of estates of the same nature, in the same neighbourhood or district, at the time of the contract.¹

¹ Cassell v. Cooke, 8 S. & R. 294-5.

CHAPTER V.

CONSTRUCTIVE FRAUD.

§ 78. HAVING examined the effects of actual frauds upon contracts and the acts of parties, we are next to consider constructive frauds; by which are meant such acts or contracts as, though not originating in evil design, or contrivance to perpetrate fraud, or injury upon other persons, yet by their necessary tendency to deceive and mislead them, or to violate public or private confidence, or to impair or injure public interests, are deemed equally reprehensible, in a legal and equitable point of view, with actual fraud, and therefore prohibited by law, as within the same reason and mischief as acts and contracts done *malo animo*.¹ Constructive frauds have been divided into three kinds; those against public policy; those in violation of trusts and fiduciary relations; and those against third persons.²

§ 79. In the first class, may properly be placed all marriage brokerage contracts, which are deemed utterly void, as against public policy, so much so that they are incapable of confirmation; and even money paid under them may be recovered back in a court of equity.³ Bonds given as a reward for using influence over another,

¹ 1 Story's Eq. § 258; 4 Bouv. Inst. 176.

² 1 Story's Eq. § 259; 4 Bouv. Inst. 176.

³ 1 Fonbl. Eq. B. I. ch. iv. § 10.

to induce him to make a will in favour of the obligor, are in the same category; and upon a similar ground, secret contracts made with parents or guardians, whereby, upon a treaty of marriage, they are to receive a compensation for promoting or giving their consent to it, are held void. The same principle pervades the class of cases, where persons, upon a treaty of marriage, by any concealment or misrepresentation mislead other parties, or do acts which are, by other secret agreements, reduced to mere forms, or become inoperative. Thus, where, upon a treaty of marriage, a party, to whom the intended husband was indebted, concealed his own debt, and misrepresented to the wife's father the amount of the husband's debts, the transaction was treated as a fraud upon the marriage, and the creditor was enjoined from enforcing his own claim.¹ This rule, however, is not applicable to an innocent misrepresentation to a woman, of the amount of her intended husband's property; and the party, making such representation without fraud, will not be estopped from claiming a debt due to him from the husband's estate, after his decease, although the value of the estate may be thereby reduced below the amount it was represented to be worth.² In all these cases and those of a like nature, the distinct ground of relief is, the meditated fraud or imposition practised by one of the parties upon third persons, by *intentional* concealment or misrepresentation.

§ 80. On the same principle, a secret settlement made by a woman shortly before her marriage and in contemplation of that event, without the knowledge of her intended husband, is a fraud upon his marital rights, and

¹ 1 Story's Eq. §§ 260-271; *Whitehill v. Lousey*, 2 Yeates, 109.

² *Coleman v. Rowland*, 11 Leg. Int. 146.

will be set aside by a court of equity;¹ and for the same reason, a voluntary release executed by a ward to the husband of her guardian, two days after she came of age, and on the eve of her marriage, without the knowledge of her intended husband, and with a view to affect his rights, was held to be fraudulent and void as against the husband.² But if she should only reasonably provide for her children by a former marriage under circumstances of good faith, it would be otherwise.³

§ 81. Upon the same ground of public policy, contracts in restraint of marriage are deemed void. A reciprocal engagement between a man and a woman to marry each other, is undoubtedly good; but a contract not to marry at all, or to marry no one but a particular person, without enforcing a corresponding reciprocal obligation on that person, is treated as mischievous to the general interests of society, which are promoted by the encouragement of suitable marriages.⁴ With regard to conditions annexed to gifts, legacies, and devises in restraint of marriage, the rule is, that such condition when annexed to a legacy of personal property is void;⁵ but valid, when annexed to a devise of lands;⁶ and that, although there be no limitation over.⁷

§ 82. Although an agreement may be founded on a legal and valuable consideration, if its object be a general or total restraint of trade as to one of the parties, it is absolutely void, as against the general policy of the law. There is, however, a known and established distinction between such bargains and contracts, as are in general

¹ *Linker v. Smith*, 4 W. C. C. 224.

² *Elliott's Estate*, 3 Penn. L. J. 215.

³ 1 Story's Eq. § 273.

⁴ *Ibid.* § 274.

⁵ *Hoopes v. Dundas*, 10 Barr, 75; *M'Irvine v. Gethen*, 3 Wh. 575.

⁶ *Com. v. Stauffer*, 10 Barr, 350; *Bennett v. Robinson*, 10 Watts, 348.

⁷ *M'Cullough's Appeal*, 2 Jones, 197.

restraint of trade, and such as restrain it only as to particular places or persons. The latter, if founded upon a sufficient consideration, are valid; the former are universally prohibited.¹ Thus, if a vendor sell his place of business and the good-will of his trade, and in his contract of sale stipulate not to carry on his trade within certain defined limits, a court of equity will enforce the specific execution of such a contract, and at the suit of the vendee, will, by injunction, restrain the vendor from carrying on his trade within the place specified in the agreement; and so, where a partner sells his interest in the good-will of a trade or business, and, on receiving a compensation therefor, agrees not to commence a similar trade or business in the same vicinity, a court of equity will restrain him by injunction from prosecuting the same.²

§ 83. Another class of constructive frauds is, that of agreements by parties not to bid against each other at a public auction, especially where they are directed by law, as in case of a sale of property under execution or distress for rent; all such agreements are held void, as against public policy, for they operate virtually as a fraud upon the sale.³ But lien creditors, as well as others, may purchase jointly at a judicial sale, if all be open and fair. A combination of interests for that purpose is not necessarily corrupt. It is the end to be accomplished which makes such a combination lawful or otherwise; if it be to depress the price of property by artifice, the purchase will be void; if, on the contrary, it be to raise the means of payment by contribution, or to divide the property for the accommodation of the purchasers, it will be

¹ 1 Bouv. Inst. 297; 4 Ibid. 179; 1 Story's Eq. § 292.

² *Palmer v. Graham*, 1 Pars. 476.

³ *Brisbane v. Adams*, 3 Comst. 129; 1 Bouv. Inst. 236.

valid.¹ A fraud of similar character, is the employment of underbidders or puffers at a public auction, to enhance the price of the property sold; such act is a fraud upon the purchaser, and will avoid the sale;² and it is not material that the property brought no more than its *general value*; a purchaser at auction has a right to buy at an under-value if he can.³

§ 84. So, a contract to procure or endeavour to procure the passage of an act of the legislature, by any sinister means, or by using personal influence with the members, is void, as being inconsistent with public policy and the integrity of our political institutions.⁴ So, a contract founded upon a promise and engagement to procure signatures and obtain a pardon from the governor, for one convicted of a criminal offence and sentenced to punishment, is unlawful and cannot be enforced.⁵ So, the procurement of an appointment to office by private influence is illegal, on the ground of public policy.⁶ And so, a bond given to a stake-holder, to indemnify him in giving up to the winner money deposited as a bet upon an election, is void, and there can be no recovery upon it.⁷

§ 85. In like manner, all agreements founded on violations of public trust or confidence, or of the rules adopted for the advancement of public justice, are deemed void.⁸ Thus, a promise of a reward to a constable for

¹ *Smull v. Jones*, 1 W. & S. 128; s. c. 6 *Ibid.* 122.

² *Pennock's Appeal*, 2 Harris, 446.

³ *Staines v. Shore*, 4 Harris, 200; *Minturn v. Main*, 3 Seld. 226.

⁴ *Clippinger v. Hepbaugh*, 5 W. & S. 315.

⁵ *Hatzfield v. Gulden*, 7 Watts, 152.

⁶ *Filson's Trustees v. Himes*, 5 Barr, 452; *Gray v. Hook*, 4 Comst. 449.

⁷ *Columbia Bank and Bridge Co. v. Haldeman*, 7 W. & S. 233.

⁸ If a sheriff, by reason of his neglect to proceed with an execution, is compelled to pay to the judgment creditor the amount of his claim, he cannot be permitted to take an assignment of the judgment, either in his own name or

arresting a criminal, under a warrant which he is bound by law to execute, is void.¹ So, a promissory note given in consideration of the payee withdrawing his opposition to the discharge of the maker as an insolvent debtor, is contrary to the policy of the law, and invalid.² So is a promise to indemnify one acting as judge of a corporate election, if he will refuse to receive the votes of duly qualified electors.³ So, no action can be maintained to recover the amount of a wager;⁴ or on a contract in violation of the revenue laws of the United States;⁵ or of either the statute or common law of this state.⁶ Agreements, founded upon the suppression of criminal prosecutions, fall under the same consideration; they have a manifest tendency to subvert public justice; yet, a prosecution for assault and battery may be settled between the parties, and a contract to pay a certain sum for set-

in that of another, for his benefit, and to enforce it against the defendant, in order to indemnify himself for the loss which he has sustained by his own breach of duty. Such a transaction is contrary to public policy and void. If an officer entrusted with the execution of final process might, without peril of ultimate loss, select his own time for its execution, he might seriously interfere with the rights of the creditor, by delaying the process to his prejudice; and he might, at his option, employ the same process to annoy and oppress the debtor and make gain to himself. Both the debtor and creditor would be, in a measure, subject to the caprice of the sheriff; and serious inconveniences would arise, if rights, either legal or equitable, were held to result to a sheriff from his own breach of duty. While it has ever been the policy of the law to protect an officer, within proper limits, from loss or damage, in the faithful discharge of his duties, it has done nothing to encourage or protect him in the neglect or violation of those duties. The consequences of all violations of duty are visited upon him, and he is not entitled to any equities beyond those which enure to any other wrong-doer. *Carpenter v. Stillwell*, 1 Kern. 61, 68.

¹ *Smith v. Whildin*, 10 Barr, 39.

² *Baker v. Matlack*, 1 Ash. 68; see 1 Pars. on Contr. 365.

³ *Weckerly v. Lutheran Congregation*, 3 Rawle, 172.

⁴ *Edgell v. M'Laughlin*, 6 Wh. 176.

⁵ *Cambioso v. Maffett*, 2 W. C. C. 98.

⁶ *Thomas v. Brady*, 10 Barr, 170.

tlement, is not *contra bonos mores*, and may be sued on;¹ so, the settlement of a prosecution for fornication and bastardy is a valid consideration to support a contract.²

§ 86. Wherever the divine law, or the statute, or common law, prohibits the doing of certain acts, or enjoins the discharge of certain duties, any agreement to do such acts, or not to discharge such duties, is illegal and void. Hence, all agreements, bonds, and securities, given as a price of future illicit intercourse, are invalid; such consideration will not even support a promise of marriage.³ So, it is an undoubted rule, that a contract growing out of a transaction whose known tendency was to encourage a breach of the laws, is not to be enforced. For this reason it has been held, that an action is not maintainable for the price of drugs purchased by a brewer, avowedly with a design to use them in violation of the provisions of a statute; or by an innkeeper for refreshments furnished to the defendant's voters at an election. So, an action has been held not to lie on a contract in reference to an illegal voyage, because the accessory follows the nature of its principal; or, for the use and occupation of lodgings, let with knowledge that they were to be used for purposes of prostitution.⁴ Nor can wages be recovered on a contract to serve as marker at an illicit billiard table.⁵ And where an agreement is invalid from the unlawfulness of its consideration, any subsequent agreement, based upon it, is equally invalid.⁶

§ 87. In fine, all contracts or agreements, which have for their object anything which is repugnant to justice, or against the general policy of the common law, or con-

¹ *Rushworth v. Dwyer*, 7 Leg. Int. 15.

² *Maurer v. Mitchell*, 9 W. & S. 71.

³ *Baldy v. Stratton*, 1 Jones, 316.

⁴ *Badgley v. Beale*, 3 Watts, 264.

⁵ *Ibid.*

⁶ *Columbia Bridge Co. v. Kline*, Bright. R. 320.

trary to the provisions of any statute, are void; and whenever a contract or agreement is entered into, with a view to contravene any of these general principles, there is no form of words, however artfully introduced or omitted, which can prevent courts of law and equity from investigating the truth of the transaction; for, *ex turpi contractû actio non oritur*, is a rule both in law and equity.¹ And if a person seek to enforce in the courts of this state, a contract which by its laws is forbidden and declared void, he must aver and prove *where* it was made, and that by the laws of that place it was authorized and valid.²

§ 88. It is a rule in equity, that when two persons are equally guilty in making a contract in violation of law, neither shall be bound or have relief in equity. There are cases however, where, although both parties are in the wrong, they do not stand *in pari delicto*. Courts of equity may therefore grant relief to one of such parties and refuse it to the other; and sometimes this is done for the purpose of supporting the public interests or public policy. Where contracts are declared void, as against the statutes of usury, if the lender seek to enforce the contract, equity will grant him no relief; but if the borrower seek relief against the usurious contract, it will be granted upon condition that he pay the defendant what is really due.³

§ 89. In regard to gaming contracts, they are declared by statute to be utterly void and of none effect; and where the money lost has actually been paid, it may be recovered back by the loser, if suit be commenced within ten days thereafter; and in such action it is

¹ Bell v. Leggett, 3 Seld. 179; Gray v. Hook, 4 Comst. 455.

² Thatcher v. Morris, 1 Kern. 437.

³ 4 Bouv. Inst. 178-9.

sufficient for the plaintiff to declare for money had and received by the defendant for his use, without setting forth the special matter.¹ A negotiable note given for a gaming consideration is void, even in the hands of an innocent holder for value; but he may sue the indorser on his indorsement.²

§ 90. The second class of constructive frauds, is that of frauds which arise from an abuse of some peculiar confidential or fiduciary relation between the parties. A court of equity interposes its benign jurisdiction to set aside instruments executed between persons standing in the relations of parent and child, guardian and ward, physician and patient, solicitor and client, and in various other relations in which one party is so situated as to exercise a controlling influence over the will, and conduct, and interests, of another. In some cases, undue influence will be inferred from the nature of the transaction alone; in others from the nature of the transaction and the exercise of occasional or habitual influence.³ The general principle which governs in all cases of this sort is, that if a confidence be reposed, and that confidence be abused, courts of equity will grant relief. There is often, in such cases, some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud; but the principle on which courts of equity act in regard thereto, stands, independent of any such ingredients, upon a motive of general public policy; and therefore, they will often interfere in such cases, where, but for the peculiar relation between the parties, they would either abstain wholly from grant-

¹ Purd. Dig. 390.

² *Unger v. Boas*, 1 Harris, 601-3.

³ *Sears v. Shafer*, 2 Seld. 272.

ing relief, or would grant it in a very modified and restricted form.¹

§ 91. Where contracts have been made between a parent and child, whereby the latter has made conveyances or contracts against his interest, courts of equity will often set them aside, upon the ground that the just confidence and influence which the parent ought to have over his child has been abused. Thus, where a conveyance had been made of her real estate by a daughter to her father, immediately before her marriage, under a belief that she would be benefited thereby, and that the property conveyed by the deed would become her's after the decease of her parent; and where the operation of the conveyance was to deprive the daughter of the estate; the court decreed a conveyance of the property, and an account of the proceeds of part which had been sold, so as to effect the justice of the case, and give to the daughter the property to which she would have been entitled, had not the conveyance been made.² But such contract must have been obtained by *undue* influence, otherwise it will not be set aside; a mere fear of displeasing a parent will not have that effect. Even when there has been some improper conduct on the part of the father, the application for relief must be made in a reasonable time, for a long delay and acquiescence on the part of the child, will deprive him of the remedy to which he might otherwise be entitled.³

§ 92. The relation of guardian and ward is one requiring the exercise of the utmost good faith on the part of the former. During the existence of the guardianship the acts of the guardian are under the constant su-

¹ 1 Story's Eq. § 307-8; Greenfield's Estate, 2 Harris, 505.

² Slocum v. Marshall, 2 W. C. C. 397.

³ 4 Bouv. Inst. 182.

pervision of the orphans' court; and during that period the relative situations of the parties renders them generally unable to deal with each other. But courts of equity go yet farther in such cases: they will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation become thereby actually dissolved, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the utmost good faith on the part of the guardian.¹ Settlements made soon after coming of age, and especially before the ward is in possession of his estate, are always viewed by the courts with a watchful, and even a jealous eye. Not that there is any thing wrong in making a settlement: it is what both parties should wish. But when the ward apprehends, on further reflection, that he has acted under a mistake, or ignorance of fact or law, there should be no hesitation on the part of the guardian in submitting to a re-examination of the account. What objection can there be to it unless papers have been lost? It should always be remembered, that when a young man comes of age he must necessarily be ignorant of his affairs, and the information which he receives must come principally from his guardian. In point of information the parties are not on an equal footing.² For this reason, releases given by wards to their guardians, soon after arriving at full age, have frequently been set aside in equity.³ And the same rule has been applied

¹ 1 Story's Eq. § 317; Wills's Appeal, 10 Harris, 332.

² Say's Executors v. Barnes, 4 S. & R. 114-15; Elliot v. Elliot, 5 Binn. 8.

³ Stanley's Appeal, 8 Barr, 431; Neisly's Appeal, Ibid. 457; Lukens' Appeal, 7 W. & S. 48.

to settlements between a master and apprentice, soon after the term of service had expired.¹

§ 93. In consequence of the advantage and imposition which it is in the power of an attorney to take of his client, a court of equity will frequently interpose to set aside a contract which, between other parties, would be unimpeachable. This is emphatically true of the relation of client and attorney, and persons standing in a situation of *quasi* guardians or confidential advisers. Many of the cases establish the doctrine, that while these connections exist in full vigour the adviser shall take no benefit to himself, from contracts or other negotiations with the advised:² a doctrine intended to supersede the necessity of any inquiry into the means used or the exertion of influence in any particular case, which is often difficult, if not impossible, from the very nature of things.³ Other authorities, where the transaction is one of contract and sale, conceding that it may not be absolutely void *ipso facto*, throw upon the agent the burden of establishing its perfect fairness and adequacy; and that it was the deliberate act of the confiding party, after being fully informed of his rights, interests, and duties, and put upon his guard against even the suggestions of his own inclination. It must appear affirmatively that no advantage has been taken of the client; and if this be not absolutely established, *uberrimâ fide*, equity will treat it as one of constructive fraud.⁴

§ 94. An attorney or other confidential adviser, is not permitted to avail himself of either the necessities of his

¹ M'Gunigal v. Mong, 5 Barr, 269.

² Hatch v. Hatch, 9 Ves. 297; Wood v. Downes, 18 Ves. 126; De Montmorency v. Devereux, 7 Cl. & Fin. 188.

³ Welles v. Middleton, 1 Cox, 125; Wright v. Proud, 13 Ves. 137.

⁴ Greenfield's Estate, 2 Harris, 506.

client or of his good nature, liberality, or credulity, to obtain undue advantages, bargains, or gratuities; and it has been said, there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it were not so.¹ A judicious writer on this subject has observed,² that equity "does not so much consider the bearing and hardship of this doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means secret and inaccessible to judicial scrutiny, from dangerous influences arising from the confidential relations of the parties;" and accordingly, it was held, that a provision in a voluntary deed in favour of the attorney who drew or advised it, for his services to be performed as a trustee under such deed, with the further provision that the said trustee might resign the trust to the other trustees named therein, without forfeiting the compensation, was void, unless it were proved that the grantor knew of the particular provisions, and, without influence from those interested, assented to them.³

§ 95. So too, of the practice, which has obtained to a considerable extent, of stipulating beforehand for professional fees, contingent on the result of the litigation. It is not a practice to be generally commended, exposing honourable men, not unfrequently, to misapprehension and illiberal remark; and giving the apparent sanction of their example to conduct which they would be among the foremost to reprehend. Such contracts may sometimes be necessary in a community such as that of Penn-

¹ *Gibson v. Jones*, 6 Ves. 278; *Montesquieu v. Sandys*, 18 Ves. 313; *Jones v. Thomas*, 3 Y. & Coll. 498; *Hindson v. Weatherill*, 23 Eng. L. & Eq. 132.

² 1 Story's Eq. § 311.

³ *Greenfield's Estate*, 2 Harris, 489.

sylvania has been, and perhaps, as it is yet; and where they have been made in abundant good faith, *uberrimâ fide*, without suppression or reserve of fact, or exaggeration of apprehended difficulties, or undue influence of any sort or degree; and where the compensation bargained for is absolutely just and fair, so that the transaction is characterized throughout by "all good fidelity to the client;" the court will hold such contracts to be valid. But it is hardly necessary to say, that such contracts, as they can scarcely be excepted from the general rule, which denounces as suspicious the dealings of fiduciaries with those under their protection, must undergo the most exact and jealous scrutiny, before they can expect the judicial ratification.¹

§ 96. Similar considerations apply to the case of a medical adviser and his patient; and a minister of religion, taking from those under his spiritual charge, may be bound by this rule with even greater stringency;² for if there be any given state of circumstances, in which a person can be placed, in which he requires to be protected against himself; it assuredly is, when he is brought in contact with, and placed under the immediate influence of his spiritual counsellor and guide, to whom he looks for direction as to his duties in life, and from whom he gathers instruction as to his preparation for death and a future state of existence. He must be wanting in a correct knowledge of the religious nature of man, who does not accord to it a power and intensity, which is not equalled by the relations of parent and child, guardian and ward, trustee and *cestui que trust*, or

¹ Ex parte Plitt, 2 Wall. Jr. 480.

² Huguenin v. Baseley, 14 Ves. 273; Thompson v. Hefferman, 4 Dru. & W. 285.

attorney and client.¹ There is no part of the jurisdiction of courts of equity more useful or more well founded, than that which assumes the control over all transactions between persons occupying confidential relations towards each other. This jurisdiction ought to be exercised, whatever be the circumstances and position of the parties between whom the confidential relation exists, whether attorney and client, guardian and ward, or surgeon and patient.² Thus, a promissory note having been given, under undue influence, by a patient to his surgeon, for an amount far beyond what was justly due, the surgeon was restrained from recovering the whole amount, but the note was retained as a security for what should prove to be justly due.³

§ 97. There are not many relations in social life, where one man depends more upon the judgment and integrity of another, than in the connection that subsists between principal and agent. The courts of equity, therefore, look upon contracts made between these parties with the same jealous care with which they watch the contracts made between other persons standing in a fiduciary relation. Secret agreements by which agents become sellers or buyers of property, which they are to buy or sell for their principals, and by which they are to derive any benefit, unknown to the principal, will be declared void, as being opposed to justice and sound policy. If an agent, employed to purchase a piece of

¹ *Greenfield's Estate*, 12 Leg. Int. 7. This case has been since reversed by the supreme court, with the remark, that no rule of law or morals will prevent clergymen from receiving gifts, great or small, from their parishioners. 12 March 1855, MS. See *Nachtrieb v. The Harmony Settlement*, 12 Leg. Int. 98.

² *Billing v. Southee*, 10 Eng. L. & Eq. 39-40.

³ *Ibid.*; and see *Greville v. Tylee*, 24 *Ibid.* 54.

land for another, buy it for himself, a court of equity will turn him into a trustee for his principal.¹

§ 98. And indeed no rule seems to be better settled, than that whenever confidence is reposed in a person who, from his being placed in such a situation has it in his power to gain an advantage, without the certainty of discovery, by sacrificing the interests of those he is bound to protect, he shall not be suffered to enjoy it, except by their consent; and not even then unless they be competent to part with their right to protection in this respect. Neither is this rule to be understood as applicable only where it is shown some advantage has been actually gained by the party acting in the character of an agent or trustee, by making a purchase in his own name, in order to give those alone, whose interest he was bound to consult and promote, the benefit of the purchase. It would, in many cases, be of little avail if it were so; it arises from the nature of the relation between the parties, and is alike applicable, however honest and fair the purchase may be; and it is not necessary to inquire whether the purchase be an advantageous one or not; because, the fact may be so, and yet not susceptible of being distinctly and clearly proved at the time; or there may even be fraud in it, and the party against whom it has been committed not able to prove it. The rule, therefore, is founded on principles of public policy; and with a view to protect the interests of those for whom the party has undertaken to act, all temptation to do anything in opposition thereto is removed, by giving them the right of claiming the benefit of the purchase.²

¹ 4 Bouv. Inst. 185-6; Myers' Appeal, 2 Barr, 463.

² Leisenring v. Black, 5 Watts, 304-5; Myers' Appeal, 2 Barr, 463; Moore

§ 99. The same rule applies to all transactions between trustee and *cestui que trust*. A court of equity will not permit a person, acting as trustee, to create in himself an interest opposite to that of his *cestui que trust* or principal. If a trustee, executor, or agent, buy in debts due by his *cestui que trust*, testator, or principal, for less than their nominal amount, the benefit gained thereby belongs not to him but to the person for whom he acted.² Compromises by which money is gained or saved by executors, administrators, or trustees, enure to the benefit of those for whom they act, and not to the benefit of the trustee. It is not in any common case that a court can allow trustees to make contracts with their *cestuis que trust*, by which contracts they make great gain to themselves.³ Where the parties stand in a very confidential relation, the party seeking to set aside a deed will not be called on to show direct fraud; yet the burden of proving that advantage was taken of the confidence incident to the relation, will nevertheless rest on him, subject however to rebuttal by proof from the other side, that the dealing was, in fact, guarded as between strangers, and without advantage taken of influence or superior knowledge.⁴

§ 100. Another well settled principle in regard to trustees and other persons acting in a fiduciary character for the benefit of others, is, that they cannot become purchasers of the trust property at their own sales, or ac-

v. Moore, 1 Seld. 256. "Even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied on, yet the principal has, in fact, bargained for the exercise of all the skill, ability, and industry of the agent, and he is entitled to demand the exercise of all this in his own favour." 1 Pars. on Contr. 74-5.

¹ *Prevost v. Gratz*, 1 P. C. C. 373.

² *Saeger v. Wilson*, 4 W. & S. 504-5.

³ *Delamater's Estate*, 1 Wh. 375.

quire any interest therein. The interest of a trustee in such case, being generally opposed to that of his *cestui que trust*, would, were he permitted to consult it and act accordingly, almost necessarily, owing to the weakness and infirmity of human nature, interfere with a faithful discharge of his duty to those for whom he had undertaken to act.¹ And this rule is not founded on his being necessarily guilty of fraud in so doing; it is a rule of public policy which applies in all cases, whether there be fraud or not, and indeed, its great object is to prevent fraud by taking away the temptation to commit it.² A purchase however, by a trustee, is not absolutely void, but voidable merely at the election of the *cestui que trust*, or those beneficially interested in the estate; so that the trustee takes the property subject to the equity of the *cestui que trust* to call upon him within a reasonable time, to account for the profits, or have a re-sale.³ And the principle that a trustee, properly so called, cannot purchase at a sale made by himself in execution of the trust, extends to judicial officers and all others, who in any respect, have a concern in the disposition and sale of the property of others; and it is immaterial whether the sale be public or private, judicial or otherwise, or for a *bonâ fide* price.⁴ The rule, however, will not invalidate

¹ *Fisk v. Sarber*, 6 W. & S. 21; *Lazarus v. Bryson*, 3 Binn. 54; *Moody v. Vandyke*, 4 Binn. 43; *Rankin v. Porter*, 7 Watts, 390; 1 Pars. on Contr. 75.

² *Webb v. Dietrich*, 7 W. & S. 402.

³ *Fisk v. Sarber*, 6 W. & S. 21; *Painter v. Henderson*, 7 Barr, 48; *Campbell v. Penn. Life Ins. Co.*, 2 Wh. 63; *Beeson v. Beeson*, 9 Barr. 279; *Wallington's Estate*, 1 Ash. 307; *Pennock's Appeal*, 2 Harris, 446; *Bruch v. Lantz*, 2 Rawle, 392.

⁴ *Fisk v. Sarber*, 6 W. & S. 22. The operation of the prohibition is not confined to those who are personally active in effecting a sale; it extends to all upon whom the act of the party, or of the law, casts a fiduciary relation to the subject of the trust, and which they are not permitted to shake off at pleasure,

the title of a trustee to land which the law has taken out of his hands, and which he purchased from one appointed by the same authority to sell it; as, where an executor purchases at a sheriff's sale the personal property of his testator, seized and sold under execution. The reasons which forbid a trustee from purchasing the trust property where he himself is the seller, do not apply to such a case.¹

§ 101. Within this rule are included all contracts by the members, officers, and agents of corporations, municipalities, and public institutions, for the sale or furnishing of any supplies or materials to the bodies which they represent; as also contracts for the sale or furnishing of such supplies or materials, in which any such member, officer, or agent may be in any manner interested; all such contracts are declared, by statute, to be utterly void, and no recovery can be had thereon.² This is not so much on the ground of such contract being necessarily fraudulent in fact, as in order to protect the parties, whom such persons represent, from the risk to which they might otherwise be subjected, by the hostile position that would be thus assumed by those whose duty it was to exercise their entire skill, ability, and industry in favour of the body of which they were the agents.

§ 102. There are many other cases of persons standing, in regard to each other, in the like confidential relations, to which similar principles apply. Among these, one of the most important to be considered, is that of principal and surety. The contract of suretyship imports entire

to assume, it may be, an attitude hostile to the persons beneficially interested. *Beeson v. Beeson*, 9 Barr, 284.

¹ Act 26 April 1855. P. L. 328.

² *Prevost v. Gratz*, 1 P. C. C. 378; *Fisk v. Sarber*, 6 W. & S. 22-3; *Cadbury v. Duval*, 10 Barr, 272.

good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise, or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract.¹ A surety is entitled to the protection of the law; and equity holds him discharged, when he who seeks to bind him does not observe the utmost good faith. Thus, the false recital in a bond, of a fact within the knowledge of the obligee, avoids it as to a surety.²

§ 103. And on the same ground, the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety. It is a trite rule in equity, that if a creditor have in his hands or power the means of payment, and voluntarily relinquish it, or if he agree, for consideration, to give to the principal debtor further credit for a definite time, without the assent of the surety, the latter is discharged, though judgments may have been recovered against both.³ The obligor and

¹ 1 Story's Eq. § 324; 1 Pars. on Contr. 514-15; *Small v. Currie*, 23 Eng. L. & Eq. 633.

² *Frisch v. Miller*, 5 Barr, 310. "Without saying that in every case, a creditor is bound to inquire under what circumstances his claim has obtained the concurrence of his surety, it may fairly be stated, that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea, that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. If a person abstain from inquiry, because he sees that the result of inquiry will probably be to show that the transaction in which he is engaged is tainted with fraud, his want of knowledge of the fraud affords no excuse." *Owen v. Homan*, 25 Eng. L. & Eq. 11.

³ *Talmage v. Burlingame*, 9 Barr, 23; *Com. v. Miller*, 8 S. & R. 457; *Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania*, 7 W. & S. 335.

obligee are bound to know, that if they find it convenient to change or vary the terms of the original contract, they must seek the assent of the surety, because it is his contract as well as theirs. And if they will not do so, they take upon themselves the hazard, and thus loosen the bonds of the surety.¹ So, if the creditor release the principal from the payment of the debt, he thereby releases the surety entirely; but if he release the principal from a part only, he only releases the surety *pro tanto*. So, if the creditor give up to the principal, or release a security which he has obtained from him for the whole debt, it will operate as a release or discharge of the surety from all liability as such; but if the security released be only for part of the debt, the surety will only be released *pro tanto*. When, however, it is impracticable to ascertain the exact value of the security released, the surety will be entirely discharged.²

§ 104. A surety is not discharged by mere forbearance to sue the principal;³ but if a creditor, after being requested to bring suit against the principal debtor, refuse or neglect to do so, the surety is discharged; provided such request be accompanied with a declaration, that unless it be complied with the surety will be considered as discharged; and such request be proved clearly and beyond all doubt.⁴ This rule was adopted in Pennsylvania, before the passage of the acts giving equity powers to the

¹ Hibbs v. Rue, 4 Barr, 350-1.

² Neff's Appeal, 9 W. & S. 43; Cathcart's Appeal, 1 Harris, 420; Everly v. Rice, 8 Harris, 299.

³ Dehuff v. Turbett, 3 Yeates, 157; Com. v. Wolbert, 6 Binn. 292; Cope v. Smith, 8 S. & R. 112; Marberger v. Pott, 4 Harris, 13.

⁴ Cope v. Smith, 8 S. & R. 116; Erie Bank v. Gibson, 1 Watts, 146; United States v. Simpson, 3 Penn. R. 439; Greenawalt v. Kreider, 3 Barr, 267; Higerty v. Higerty, 4 Am. L. J. 102.

courts in cases of constructive fraud; and because our courts held themselves bound to administer equity, in all cases where they were not restrained by the forms of law. But the surety may have recourse to equity to compel the creditor to bring suit against the principal; and therefore, when a creditor makes an agreement by which he disables himself from bringing suit, without the consent of the surety, he acts against equity, and ought not to hold the surety responsible.¹

§ 105. The third class of constructive frauds, which are now to be considered, are those affecting the rights of third persons. Whenever the contracts of individuals operate substantially upon the rights and interests of third persons, or unconscientiously compromise the rights, and injuriously affect the interests of the parties themselves, they will be considered as fraudulent, and for these reasons a court of equity will set them aside. This class of constructive frauds includes what are called catching bargains or agreements made with an heir expectant, for the purchase of his expectancy at an inadequate price.² Such a sale is considered fraudulent as regards third persons, since, if permitted, it would be destructive of parental authority. The same rule applies to the case of a reversioner or remainder-man, who has an estate, but no right of present enjoyment, and who, through necessity or from mere improvidence, sells his rights much below an adequate price. To constitute this constructive fraud, there must be ignorance of the transaction by the parent or person standing *in loco parentis*; and the contract must have been made under some pressing necessity. Contracts made with sailors, for the transfer of their wages or prize money, are looked upon

¹ Cope v. Smith, 8 S. & R. 112.

² Davidson v. Little, 10 Harris, 251.

in the same light, and will be set aside in equity, whenever any inequality appears in the bargain, or any undue advantage has been taken of them.¹

§ 106. Another class of constructive frauds upon the rights of third persons, embraces all those agreements and other acts of parties, which operate directly to delay, defraud, or deceive creditors. The statute 13 Eliz. ch. 5, which has always been held to be in force in Pennsylvania, provides, that every gift, conveyance, &c. of lands or chattels, or of any profit or charges out of them, by writing or otherwise, and every bond, suit, judgment, and execution, had or made to and for the intent or purpose, to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, damages, &c., shall be deemed, only as against those persons, their heirs, successors, executors, administrators, and assigns, whose actions, &c. are delayed or defrauded, utterly void; with a proviso, that this shall not extend to any estate or interest, upon good consideration and *bonâ fide*, lawfully conveyed or assured to any person, not having at the time any manner of notice or knowledge of such fraud.²

§ 107. This statute does not declare all voluntary conveyances to be void, but only all fraudulent conveyances, and whether a conveyance be fraudulent or not, is declared to depend upon its being made "upon good consideration and *bonâ fide*." It is not sufficient that it be upon good consideration or *bonâ fide*: it must be both.³ To bring a case within the statute the conveyance must be voluntary; it must be made by the owner of the land,

¹ 4 Bouv. Inst. 187-90. One in whom a tract of land is vested, but in one half of which another has a life estate, and who, shortly after he becomes of age, sells the whole tract, is not within the rule in equity with regard to bargains by expectant heirs. *Davidson v. Little*, 10 Harris, 245.

² Rob. Dig. 295.

³ 1 Story's Eq. § 353.

he being at the time indebted; and with intent to delay, hinder, and defraud creditors or others, of their just and lawful actions, &c.; and in general, the intent will be presumed from the circumstance of the party being indebted. Where these circumstances concur, the conveyance is void, as well in respect to subsequent as prior creditors.¹

§ 108. A voluntary deed is not void as to subsequent creditors, unless there exist other circumstances besides the want of consideration from which fraud can be legally inferred, as, if the grantor incur debts immediately, or so soon afterwards, as to warrant a presumption that it was made in contemplation of such future indebtedness; so, if he were indebted at the time to the extent of insolvency, or it seems of great embarrassment; unless the presumption of fraud be repelled by proving that the prior debts were secured by mortgage, or by a provision in the deed itself. The proof of prior indebtedness rests upon the party attempting to avoid a deed on the ground of subsequent indebtedness, and the court cannot presume it.² And to render a voluntary conveyance, by one indebted, fraudulent as to subsequent creditors, the debts must bear some proportion to the property of the grantor, which may render their payment doubtful.³

§ 109. A conveyance within the provisions of the statute is absolutely void as against creditors, and vests no estate whatever, either legal or equitable, in the grantee; hence, although the grantor may have been actually indebted to the grantee in a certain amount, this debt will

¹ *Gilmore v. North American Land. Co.*, 1 P. C. C. 460, 464.

² *Ridgeway v. Underwood*, 4 W. C. C. 129; *Greenfield's Estate*, 2 Harris, 502.

³ *Wilson v. Howser*, 2 Jones, 109; *Mateer v. Hissim*, 3 Penn. R. 160; *Thomson v. Dougherty*, 12 S. & R. 448.

not be entitled to any preference over the other debts of the grantor.¹ And it matters not whether the consideration paid amount to the whole value of the land or not. The consideration of a sale may amount to the value of the land sold, and yet the sale be fraudulent as against creditors, because such sale may not only delay, hinder, and obstruct them in the collection of their debts, but it may also be made for that very purpose and intent. Thus, a man may sell and receive bonds payable at long dates, and thus delay and hinder creditors. It is the intent that gives character to the transaction; and when the act corresponds with the intent, and both concur in delaying and hindering creditors, the deed is void.² A conveyance, however, in consideration of an existing debt, is not fraudulent, although the parties contemplate that the claims of other creditors will be thereby defeated.³

§ 110. But the statute does not operate in a contest betwixt the actors themselves, on what it declares to be fraud only in its relation to third persons; for in any other aspect there is no fraud whatever, and it is unimportant whether the contract be used to found a claim betwixt the parties to it, or to rebut one; it is free from taint in regard to *them*, and the one may use it against the other for any purpose whatever. The reason why a contract, void against creditors, may be set up against either of the parties to it, is not because he shall not be allowed to defeat it by showing his own criminality, but because there is no criminality to be shown. It is a trite remark, that though a contract within the purview of the statute is no contract at all against the interests

¹ *M'Kee v. Gilchrist*, 3 Watts, 230.

² *Zerbe v. Miller*, 4 Harris, 497; *Covanhovan v. Hart*, 9 Harris, 500.

³ *Covanhovan v. Hart*, 9 Harris, 495.

intended to be defrauded, yet it is a contract in respect to every thing else; and consequently must have all the effect of one betwixt the parties to it. The fraud, which is declared to be so by statute, is legal and not actual.¹

§ 111. Questions frequently arise as to the validity of assignments in trust for the benefit of the creditors of the assignor as effected by this statute. On this subject, the rule is well settled, that no debtor can in an assignment make a reservation, at the expense of his creditors, of any part of his income or property for his own benefit; nor can he stipulate for any advantage either to himself or family.² Therefore, before the act prohibiting preferences, an assignment by an insolvent debtor, stipulating for a release, was invalid, unless it contained words competent to transfer all the debtor's property.³ So, a conveyance, in trust to sell, reserving a power of appointment of the proceeds, is void as to the creditors of the assignor.⁴ So also, a provision authorizing the trustees to sell the assigned property upon credit, has been held to render the deed fraudulent and void as to the creditors:⁵ and so has a provision, that the trustee shall not be accountable for any loss sustained by the trust property, unless it shall happen by gross negligence or wilful misfeasance; for a trustee for the benefit of creditors, being entitled to a compensation for his services in the execution of the duties of his trust, is chargeable with

¹ *Sherk v. Endress*, 3 W. & S. 256; *Cook v. Grant*, 16 S. & R. 211; *Sickman v. Lapsley*, 13 Ibid. 224; *Telford v. Adams*, 6 Watts, 429; *Stewart v. Kearney*, Ibid. 453; *Handy v. R. R. Co.*, 7 Leg. Int. 26.

² *M'Clurg v. Lecky*, 3 Penn. R. 91-2.

³ *In re Wilson*, 4 Barr, 430; *Thomas v. Jenks*, 5 Rawle, 221; *Hennessy v. Western Bank*, 6 W. & S. 300; *During's Appeal*, 1 Harris, 224.

⁴ *Mitchell v. Stiles*, 1 Harris, 306.

⁵ *Nicholson v. Leavitt*, 2 Seld. 510; *Kellogg v. Slauson*, 1 Kern. 302.

the care and diligence of a provident owner, and liable for a loss occasioned by ordinary negligence.¹

§ 112. Another class of constructive frauds consists of those in violation of the statutes prohibiting preferences in assignments in trust for the benefit of creditors. All such preferences (except for the payment of wages, not severally exceeding the sum of one hundred dollars) are declared to be void, and such assignments will enure for the benefit of all the creditors, in proportion to their respective demands. A stipulation for a release is a preference within the meaning of this act.² The act does not invalidate the assignment;³ nor does it prohibit a composition with a part of the creditors;⁴ nor an assignment of partnership property for the payment of the firm debts only.⁵ Judgments confessed to secure creditors are not such preferences as are avoided by this act.⁶ It goes no further than to forbid preferences in and by the instrument by which the debtor surrenders to his creditors all dominion over his property.⁷

§ 113. There is another class of constructive frauds, consisting of cases in which a party buys with full notice that another has a legal or equitable title to the same property.⁸ If, for example, a purchaser of land have notice of a prior unrecorded deed, he will not be permitted to avail himself of his title against that prior conveyance. For such purchaser with notice is not considered a *bonâ fide* purchaser, but as one acting in bad

¹ Litchfield v. White, 3 Seld. 438, 442-3.

² Purd. Dig. 52.

³ Law v. Mills, 6 Harris, 185.

⁴ Wiener v. Davis, 6 Harris, 331.

⁵ Baker's Appeal, 9 Harris, 77, 83.

⁶ Blakey's Appeal, 7 Barr, 449; Morgan's Appeal, 8 Harris, 152.

⁷ Worman v. Wolfersberger, 7 Harris, 59; Bredding v. Boggs, 8 Harris, 33; Hutchinson v. M'Clure, Ibid. 63.

⁸ Sergeant v. Ingersoll, 3 Harris, 349.

faith, a *particeps criminis*, taking the place of his vendor; and to permit him to hold against the first purchaser would be to convert the statute into an instrument of fraud.¹ A subsequent *bonâ fide* purchaser, without notice, is alone within the protection of the recording acts;² but a purchaser with notice is protected by want of notice in his vendor.³ And the purchaser of the same title is alone protected; the purchaser of an adverse title is not within the statute.⁴

§ 114. The recording of a deed of conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property.⁵ But this doctrine is not to be understood of all conveyances which may be actually recorded, but of such only as are authorized by law to be recorded. The registry of a deed, defectively proved or acknowledged, is not evidence of notice to a subsequent purchaser, although the deed be recorded in the county in which the lands lie.⁶

§ 115. Under this head is included notice by *lis pendens* or an interlocutory decree; for it is presumed that legal proceedings, during their continuance, are publicly known throughout the state; and therefore, a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, without any express or implied notice in point of fact, affects the purchaser in the same

¹ Jacques v. Weeks, 7 Watts, 270.

² Shrider v. Nargan, 1 Dall. 68; Foster v. Whitehill, 2 Yeates, 259; Burke v. Allen, 3 Ibid. 360; Stroud v. Lockart, 4 Dall. 153; Henry v. Morgan, 2 Binn. 497; Plumer v. Robertson, 6 S. & R. 179.

³ Bracken v. Miller, 4 W. & S. 102; Sailor v. Hertzog, 4 Wh. 264.

⁴ Harper v. Farmers' and Mechanics' Bank, 7 W. & S. 209; Henry v. Morgan, 2 Binn. 497.

⁵ Bellas v. M'Carty, 10 Watts, 26.

⁶ Simon v. Brown, 3 Yeates, 186; Heister v. Fortner, 2 Binn. 40; Bolton v. Johns, 5 Barr, 145.

manner as if he had such notice; and he will accordingly be bound by the judgment or decree.¹ *Lis pendens* is as near to actual notice as the registry of a deed;² and therefore, the mere transmission of the legal title to another, subject to the equity of the purchaser, creates no impediment to a decree for specific performance.³ On the other hand, a final decree is not notice to any others than the parties or privies to it; unless the party sought to be affected, has actual notice of such decree.⁴

§ 116. In the absence of any actual information of the equity, a party may also be affected with notice by information of any fact, relating to the subject matter of his contract, which if properly inquired into would have led to its ascertainment. If, for instance, he purchase land which he knows to be in the occupation of another than the vendor, he is bound by all the equities of the party in occupation. The possession of land is notice to the world of every title under which the occupant claims it, unless he have put a title on record inconsistent with his possession.⁵ It is settled, that actual and unequivocal possession is notice, not so much because possession is evidence of actual notice, as because it is the duty of one, who is about to purchase real estate, to ascertain by whom and in what right it is held or occupied.⁶

§ 117. It is not essential that the notice be given to the party himself; it is sufficient if it be brought home to his agent, attorney, or counsel; for in such cases the

¹ *Walker v. Butz*, 1 Yeates, 574; *Baird v. Corwin*, 5 Harris, 466; *Weckerly's Appeal*; S. C. 20 March 1854, MS; *Brown v. Blydenburgh*, 3 Seld. 146.

² *Welty v. Ruffner*, 9 Barr, 225.

³ *Tiernan v. Roland*, 3 Harris, 437; *De Chaumont v. Forsythe*, 2 Penn. R. 507.

⁴ 1 Story's Eq. § 407.

⁵ *McCulloch v. Cowher*, 5 W. & S. 429; *Woods v. Farmere*, 7 Watts, 382; *Boggs v. Varner*, 6 W. & S. 474.

⁶ *Sailor v. Hertzog*, 4 Wh. 259; 2 Lead. Cas. Eq. 150.

law presumes notice to the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter.¹ But to visit a principal with constructive notice, it is necessary that the knowledge of the agent should be gained in the same transaction.² It is well settled, that if one in the course of his business as agent, attorney, or counsel for another, obtain knowledge from which a trust would arise, and afterwards become the agent, attorney or counsel of a subsequent purchaser, in an independent and unconnected transaction, his previous knowledge is not notice to such other person for whom he acts. The reason is, that no man can be supposed always to carry in his mind the recollection of former occurrences; and moreover, in the case of the attorney or counsel, it might be contrary to his duty to reveal the confidential communications of his client.³

§ 118. It is proper here to consider the effect of the statute of 27 Eliz. ch. 4, upon voluntary conveyances of real estate, in regard to subsequent purchasers. Such conveyances are usually enumerated amongst the constructive frauds against which equity will grant relief.⁴ There is no doubt, that under this statute a subsequent sale without notice, by a person who had made a prior voluntary settlement, is presumptive evidence of fraud, which throws on those claiming under such settlement, the burden of proving that it was *bonâ fide*.⁵ But in Pennsylvania, the recording of the prior voluntary conveyance is notice to the subsequent purchaser; and it is

¹ Sergeant v. Ingersoll, 3 Harris, 349. ² Bracken v. Miller, 4 W. & S. 102.

³ Hood v. Fahnestock, 8 Watts, 491-2.

⁴ 1 Story's Eq. § 425; 1 Am. Lead. Cas. 70.

⁵ Cathcart v. Robinson, 5 Peters, 280.

here well settled, that a voluntary deed, duly recorded, is as valid against a subsequent purchaser as a deed for a valuable consideration, provided it be untainted by actual fraud.¹

§ 119. Having thus gone over the three great heads of equity jurisdiction, in cases of fraud, accident, and mistake, it only remains to consider the mode in which a court of chancery interferes to grant relief. In cases of accident and mistake, this is chiefly done by reforming the instrument, so as to make it conform to the true intent of the parties. But where there is fraud, actual or constructive, the court will direct the deed, or other security, to be delivered up and cancelled.² Courts of equity will generally set aside, cancel, and direct to be delivered up, agreements and other instruments, however solemn in their form and operation, where they are voidable, and not merely void; either where there is actual fraud in the party defendant, in which the party plaintiff has not participated; or where there is a constructive fraud against public policy, and the party plaintiff has not participated therein; or where there is a fraud against public policy, and the plaintiff has participated therein, but public policy would be defeated by allowing it to stand; or lastly, where there is a constructive fraud by both parties, but they are not *in pari delicto*.³ So courts of equity will direct the cancellation of a void instrument, unless its illegality appear upon the face of it, so that its nullity can admit of no doubt; since it may be used for a fraudulent and improper purpose.⁴

¹ Lancaster v. Dolan, 1 Rawle, 231; Foster v. Walton, 5 Watts, 380; Dougherty v. Jack, Ibid. 456; Speise v. M'Coy, 6 W. & S. 487.

² Henderson v. Hays, 2 Watts, 153.

³ 2 Story's Eq. § 695; North American Ins. Co. v. Levy, 1 Am. L. R. 243.

⁴ 2 Story's Eq. § 700.

CHAPTER VI.

ACCOUNT.

§ 120. THE statutes giving equity jurisdiction to the courts, before enumerated,¹ in cases of accident, mistake, and fraud, have also invested them with the like powers, in all cases over which courts of chancery entertain jurisdiction under the head of account. And by the act of 1840, the supreme court, the several district courts, and courts of common pleas, have conferred upon them all the powers and jurisdiction of courts of chancery, in settling partnership accounts, and such other accounts and claims, as by the common law and usages of this commonwealth have heretofore been settled by the action of account render. But no bill in chancery can be entertained, under this latter act, unless the counsel filing the same shall certify, that in his opinion the case is of such a nature that no adequate remedy can be obtained at law, or that the remedy at law will be attended with great additional trouble, inconvenience, or delay.²

§ 121. In Pennsylvania, the action of account render

¹ Ante, § 35.

² Purd. Dig. 306. By act of 25th April 1850, the courts of common pleas are invested with full equity jurisdiction in cases of account between tenants in common of mines of coal, or iron-ore, or other minerals; and if any of them reside out of the county in which the lands lie, the court may make such rule for service on them, by publication or otherwise, as they shall deem proper. Purd. Dig. 21, 310; see *Irvine v. Covode*, 3 Pittsburgh Leg. J. 26.

lies between partners;¹ between client and attorney;² tenants in common;³ guardian and ward;⁴ trustee and *cestui que trust*;⁵ against an executor for a legacy;⁶ and in general, in all cases where one man has received money as the agent of another, and where relief may be had in chancery.⁷ Thus, an action of account render will lie upon a contract of lease by the landlord against the tenant, to recover that portion of the profits of the demised property, which, by his contract, he was bound to render as rent.⁸ But to support this action, generally, a contract express or implied must be shown: the liability to account for the profits of an infant's lands is an excepted case.⁹ So also it lies for and against executors and administrators.

§ 122. The action of account render is a very unfit instrument to ascertain and adjust the real merits of long, complicated, and cross accounts. It is inapplicable to a vast variety of cases of equitable claims, of constructive trusts, of fraudulent contrivances, and of tortious misconduct. There is a want of due power to draw out the proper proofs from the party's own conscience, and there is also an inconvenience in taking the account at law, by reason of the incapacity of the legal procedure to operate beyond the immediate plaintiff and defendant, or

¹ Griffith v. Willing, 3 Binn. 317; Whelen v. Watmough, 15 S. & R. 156.

² Bredin v. Kingland, 4 Watts, 420.

³ Griffith v. Willing, 3 Binn. 319; Irvine v. Hanlin, 10 S. & R. 220; Keisel v. Earnest, 9 Harris, 90.

⁴ Shollenberger's Appeal, 9 Harris, 340.

⁵ Dennison v. Goehring, 7 Barr, 175; Bredin v. Dwen, 2 Watts, 95; Conklin v. Bush, 8 Barr, 517.

⁶ Purd. Dig. 21, pl. 4.

⁷ Bredin v. Kingland, 4 Watts, 422.

⁸ Long v. Fitzimmons, 1 W. & S. 530.

⁹ King of France v. Morris, 3 Yeates, 251; Conklin v. Bush, 8 Barr, 516-17.

to include rights or claims, which may be collaterally involved.¹

§ 123. The difficulties thus existing at law are effectually obviated by the procedure in equity. A foundation is first laid for all necessary inquiries, by the discovery elicited by the defendant's answer. The account is then referred to a master, who is armed with power not only to examine witnesses, but also to examine the parties themselves, and to compel production of books and documents. It is not liable to interruption by controversies on particular items, but is carried on continuously to its close. The master reports the final result to the court. The report may be excepted to on any points which are thought objectionable, and all such points are simultaneously re-examined by the court, and either at once determined, or, if necessary, referred back to him for review. As soon as the report is finally settled and confirmed, a decree is made for payment of the ultimate balance. If the interests of other persons are entangled in the account, the court may require that they be made parties to the suit, or may direct, if necessary, the institution of cross-suits; and thus, having all their interests before it, may so modify a single decree, as effectually to embrace and arrange them all.²

§ 124. The ground upon which courts of equity entertain jurisdiction in matters of account, is either that a court of law cannot give any remedy at all, or not so complete a remedy as courts of equity. The doctrine now generally held in America is, that in all cases where a court of equity has jurisdiction for discovery, and the discovery is effectual, that becomes a sufficient foundation upon which the court may proceed to grant full re-

¹ 1 Story's Eq. § 449; Adams' Eq. 225.

² Adams' Eq. 225-6.

lief. In other cases, where the court has legitimately acquired jurisdiction over the cause for the purpose of discovery, it will, to prevent multiplicity of suits, entertain the suit also for relief.¹ When once a court of equity takes cognizance of a litigation, it will dispose of every subject embraced within the circle of contest, whether the question be of remedy, or of distinct yet connected topics of dispute.² Another and more general ground has been asserted for the jurisdiction; and that is, not that there is not a remedy at law; but that the remedy is more complete and adequate in equity.³

§ 125. It is likewise well settled, that courts of equity will entertain jurisdiction in matters of account, not only when there are mutual accounts, but also when the accounts to be examined are on one side only, and a discovery is wanted in aid of the account, and is obtained. But in such a case, if no discovery be asked, or required by the frame of the bill, the jurisdiction will not be entertained. On the whole, it may be laid down as a general doctrine, that in matters of account, growing out of privity of contract, courts of equity have a general juris-

¹ *Bank of United States v. Biddle*, 2 Pars. 53; 1 Story's Eq. § 456.

² *M'Gowin v. Remington*, 2 Jones, 63; *Shollenberger's Appeal*, 9 Harris, 340.

³ 1 Story's Eq. § 457; *Bank of United States v. Biddle*, 2 Pars. 53; *M'Gowin v. Remington*, 2 Jones, 63. There are a number of cases in which a concurrent jurisdiction is exercised by the two courts; and, in many of them, the ground of the equity jurisdiction is, not that the common law courts are incompetent to afford a remedy, but that such a remedy is less complete than the court of equity, from the nature of its organization, is capable of affording. Cases, for example, of fraud, account, dower and partition, are clearly cognizable in the common law courts; and yet the court of chancery has always exercised a concurrent jurisdiction over them, upon the ground above-mentioned. Courts of law have, in modern times, and with great propriety, dispensed with profert of a lost bond; and yet, the original jurisdiction of the court of equity to grant relief, by establishing the instrument, remains unimpaired. *Harrison v. Rowan*, 4 W. C. C. 205.

diction, where there are mutual accounts, (and *à fortiori* where these accounts are complicated,) and also where the accounts are on one side, but a discovery is sought, and is material to the relief. And on the other hand, where the accounts are all on one side and no discovery is sought or required; and also where there is a single matter on the side of the plaintiff seeking relief, and mere set-off on the other side, and no discovery is sought or required; in all such cases courts of equity will decline taking jurisdiction of the cause.¹

§ 126. In matters of account, where several debts are due by the debtor to the creditor, it often becomes material to ascertain to what debt a particular payment made by the debtor is to be applied. This is called the appropriation of payments. Upon this subject the general rule is, that where a debtor, indebted on several accounts, makes a payment, he may apply it to either account;² if he do not, the creditor may do so; and if neither do, the law will appropriate it according to the justice of the case, provided there be no other parties interested.³ Where neither party has exercised the right of appropriation, the law presumes, in ordinary cases, that the debtor intended to pay in the way which at the time was most to his advantage. Thus, if it were peculiarly the interest of the party to have the money received in extinguishment of a particular demand, the law intends that he paid it in extinguishment of such demand, and that the omission to declare his intention was accidental. Such intendment is reasonable and natural, and one which will, in most cases, accord with what was actually

¹ Bank of U. S. v. Biddle, 2 Pars. 54-5; 1 Story's Eq. § 458-9.

² Pennypacker v. Umberger, 10 Harris, 495.

³ Postmaster General v. Norvell, 1 Gilp. 106; 1 Am. Lead. Cas. 291.

the fact: it is therefore equivalent to an exercise of the party's rights by acts, or an express declaration of intention; where however, the interest of the debtor could not be promoted by any particular appropriation, there is no ground for a presumption of any intention on his part, and the law then raises a presumption, for the same reason, that the payment was actually received in the way that was most to the advantage of the creditor.¹

§ 127. Thus, payments made generally on a bond, payable in instalments, without appropriation at the time to any particular instalments, will not be applied by law to such as are not then payable, but to such as are payable, according to the dates at which they respectively became so.² So, if an unconditional payment be made upon a bond bearing interest, which is not yet due, it must be applied first to the extinguishment of the interest up to the time when the payment was made, then to the principal, *pro tanto*;³ and in cases of running accounts, without any specific appropriation by either party, when debts and credits are made at different times, the payments are to be deemed as made on account of liabilities antecedently due, as they stand in the account.⁴

§ 128. The provision of the Roman law, which, in the application of a payment, requires the creditor, when the right has devolved on him by the laches of the debtor, to consult the debtor's interest in preference to his own, has not been adopted as a part of the com-

¹ Harker v. Conrad, 12 S. & R. 305.

² Seymour v. Sexton, 10 Watts, 255; 1 Am. Lead. Cas. 292.

³ Spires v. Hamot, 8 W. & S. 17.

⁴ Speck v. Commonwealth, 3 W. & S. 328; Berghaus v. Alter, 9 Watts, 386; Reed v. Ward, 10 Harris, 151.

mon law; and the propriety of an instant and actual application, by a creditor firm, of the proceeds of a separate note transferred to it generally as collateral security, without specifying for what debt, by a partner indebted to it on joint and separate account, cannot be questioned.¹ The entry or memorandum of the application ought, however, to be of a date so early as to raise a presumption that the act of application was simultaneous with the act of reception, and not the consequence of an after-thought.²

§ 129. The rule, that payments shall be applied to the charges in the order of time in which they accrue, will apply to accounts with a partnership, of which there is some change in the members, provided the account goes on as one continuous, open, and current account; but if the continuity of the account be broken, that is, if a new account be opened by or with the firm, upon the coming in or going out of a member, distinct from the old account, the creditor may apply a general payment to the new account if he please.³ But this rule, allowing or requiring a payment to be applied to the earliest item in an account, will not prevail, where a different intention in both parties, or on the debtor's part, is expressly shown, or is to be inferred from the course of dealing, or from the particular circumstances of the case.⁴ Nor will it prevail against the principle that the fund from which the payment is made, will control the application; for if one indebted individually, enter afterwards

¹ *Logan v. Mason*, 6 W. & S. 9; 1 Am. Lead. Cas. 293.

² *Ibid.* 15; but see 1 Am. Lead. Cas. 297.

³ *Simpson v. Ingham*, 2 B. & C. 6; *Logan v. Mason*, 6 W. & S. 9; 1 Am. Lead. Cas. 306.

⁴ *Taylor v. Kymer*, 3 B. & Ad. 320, 333; *Henniker v. Wigg*, 4 Q. B. 792; *Capen v. Alden*, 5 Met. 268, 278.

into partnership, a payment from the partnership funds could not be applied to his individual account.¹

§ 130. Nor will the rule apply to cases in which the relations between the creditor and other parties to be affected are such, as to make it part of the contract that there shall be a different application. Thus, where a collecting or receiving officer has given bonds, with different sureties, for successive periods, and becomes a defaulter, payments becoming due, and paid during the period to which the second bond applies, are not, as against the sureties, to be considered as applied in the order of time, so as to relieve the sureties in the first bond at the expense of those in the second bond, but must be credited to the obligation for which the second set of sureties are bound; for the contract of the sureties is, that each set is to be liable only for actual defaults during the period for which they are bound; and however the accounts may be made up and payments applied between the officer or principal debtor and the government, or creditor, the amount of default, for which any set of sureties are to be made liable, is to be ascertained by the difference between the moneys received and the moneys paid over, during the period for which they are sureties.²

§ 131. One of the most general heads of equity jurisdiction, arising from matters of account, is that of agency; embracing claims against attorneys, factors, consignees, receivers, and stewards. In agencies of this character, there are either mutual accounts between the parties; or if the account be on one side, as the relation

¹ *Thompson v. Brown*, 1 Mood. & Malk. 40; 1 Am. Lead. Cas. 306; see *Fairchild v. Holly*, 10 Conn. 176.

² *Com. v. Baynton*, 4 Dall. 282; *Com. v. Reitzel*, 9 W. & S. 109; *Postmaster General v. Norvell*, 1 Gilp. 106; *Miller v. Com.* 8 Barr, 444; *M'Kee's Executors v. Com.* 2 Am. L. R. 186.

naturally gives rise to great personal confidence between the parties, it rarely happens that the principal is able, in case of legal controversy, to ascertain his rights, or the true state of the accounts, without resorting to a discovery by the agent. In truth, there are many cases of factorage, and consignments, and of general receipts and disbursements of money, by receivers and stewards, where, if the relation has long subsisted, and intricate and perplexing accounts have arisen, it is possible, nay, very probable, that, independent of a discovery, the remedy of the principal might be utterly nugatory, or grossly defective. Hence, in cases of this description, courts of equity will entertain the suit.¹ Whenever such a relation exists a bill will lie for an account.²

§ 132. There are many cases of implied agencies, where the parties may be called to an account by a bill in chancery. This is the case between trustee and *cestui que trust*; between tenants in common; between part owners of goods and of ships; between the owners of ships and the masters; and between joint tenants.³ In all these cases, a bill may be filed for a discovery of the amount of property the defendant has received, and for an account to the other parties in interest for their respective shares, deducting the proper charges and expenses.⁴

§ 133. Cases of apportionment and contribution form another class, in which courts of equity exercise jurisdiction on the ground of the necessity for an account between the parties. In most of these cases, a discovery

¹ Bank of United States v. Biddle, 2 Pars. 55.

² Bank of Kentucky v. Schuylkill Bank, 1 Pars. 221; McKensie v. Johnson, 4 Madd. 198; Massey v. Banner, Ibid. 416.

³ Knox v. Campbell, 1 Barr, 366.

⁴ 4 Bouv. Inst. 226-7.

is indispensable for the purposes of justice; and where this does not occur, there are other distinct grounds for the exercise of equity jurisdiction, in order to avoid circuitry and multiplicity of actions. It is a known and familiar principle of the common law, that an entire contract is not apportionable; and courts of equity have generally, but not universally, applied the same doctrine. Thus, in no case whatever has rent ever been permitted to be apportioned in respect to time, not even in equity; and therefore, at common law, if the tenant for life give a lease for years, rendering a yearly rent, which was payable at the expiration of the year, and he died but a day before the year expired, the rent could not be apportioned, and the tenant was under no obligation to pay any part of it.¹

§ 134. But the exigencies and interests of society have broken in upon this rule, and caused it to yield to the accommodation of mankind, in apportioning rent, wherever there has been, either by act of law, or by act of the party, a division made of the land out of which the rent issues, or of the reversion to which it is incident; because, without this privilege, a man who can only dispose of his real estate to advantage by dividing it, might be forced to make a sacrifice of it; and it is also obvious, that the numerous members of the same family could not be accommodated, or their interests at all promoted, without it. Hence, a reversioner may sell and dispose

¹ *Bank of Pennsylvania v. Wise*, 3 Watts, 404. This severe doctrine of the common law was remedied in our state by the act of 24 February 1834, § 7, which provides, that "the rents of any real estate accruing to any tenant for life of such estate, who had demised the same for a term or time not fully expired at his decease, shall go to and be vested in the executors or administrators of such tenant; and the due proportion of such accruing rent to be computed according to the time elapsed at the decease of such tenant, shall be included in the inventory of personal assets." *Purd. Dig.* 193.

of his estate, in different parts, to as many different persons, and the lessee or tenant will be bound to pay to each his due proportion of the rent. Or if he should die, leaving a number of children, his estate will descend and pass by operation of law to them, to be held, in this state, as tenants in common, and each may claim, and the tenant will be bound to pay to him, his proportion of the rent.¹

§ 135. So, where land was granted in fee, reserving an annual ground rent, and afterwards a public street was opened through a part of the lot, and damages were awarded, a portion of which was ordered to be paid to the owner of the ground rent; it was held that the ground rent was thereby apportioned, and that a court of equity had jurisdiction to decree an apportionment thereof.² So, a release of part of the land out of which a ground rent issues, does not extinguish the whole rent, but it is to be apportioned.³ And so also it seems, that if by any thing existing at the time of the execution of a ground rent deed, the grantee is prevented from the possession and enjoyment of a part of the property which the deed purports to convey, in such case the rent is to be apportioned.⁴

§ 136. There are other cases in which the common law allows of an apportionment of a common charge towards the discharge of a common burden, and in which the same relief may be had in a court of equity. Thus, if a devisee, or one of the heirs of a decedent, lose his lands by an execution, he is entitled to a contribution from the owners of the remaining part of the decedent's lands.⁵ So, if the devisees of lands as

¹ *Bank of Pennsylvania v. Wise*, 3 Watts, 404; *Reed v. Ward*, 10 Harris, 149.

² *Cuthbert v. Kuhn*, 3 Wh. 357.

³ *Ingersoll v. Sergeant*, 1 Wh. 337; and see *Paul v. Vannie*, 2 Penn. L. J. 309.

⁴ *Naglee v. Ingersoll*, 7 Barr, 194; *Garrison v. Moore*, 9 Leg. Int. 2.

⁵ *Guier v. Kelly*, 2 Binn. 299.

tenants in common, make partition by agreement, and the portion of one of them be sold for the payment of the debts of the testator, he is entitled to contribution by the other devisees.¹ And so also, where A. mortgaged his land, and died, after having devised all his estate to B; B. devised the mortgaged premises to C. for life, with power to dispose thereof by will, and gave the rest of her estate to her executors, who sold part of it for the payment of debts; and judgment having been obtained on the bond accompanying the mortgage, the sheriff levied on all the lands undisposed of; it was adjudged that all the lands levied on should contribute according to the value of the several tracts.²

§ 137. If however, there be several purchasers in succession, at different times, of land incumbered by a mortgage or judgment, in that case, there is no equality, and no contribution as between the purchasers. Thus, for instance, if there be a judgment against a person owning at the time three acres of land, and he sell one acre to A., the remaining two acres are first chargeable in equity with the payment of the judgment debt, and that too whether the land be in the hands of the debtor himself or of his heirs. If he sell another acre to B., the remaining acre is then chargeable, in the first instance, with the debt, as against B., as well as against A., and if it should prove insufficient, then the acre sold to B. ought to supply the deficiency, in preference to the acre sold to A.; because when B. purchased he took his land charged with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect, we may say of him, as is said of the heirs, he sits in the

¹ Rhoads' Estate, 3 Rawle, 420.

² *Morris v. Griffith*, 1 Yeates, 189; s. c. 2 Dall. 189.

seat of his grantor, and must take the land with all its equitable burdens; it cannot be in the power of the debtor, by the act of assigning or selling his remaining land, to throw the burden of the judgment, or a rateable part of it, back upon A.¹ But this rule does not apply to the case of a sale of the mortgaged premises by the sheriff under a judgment, subject to the mortgage; the purchasers at sheriff's sale, of portions of the mortgaged premises, are *in equali jure*; and the portions so purchased are, as between themselves, liable to the payment of the mortgage debt in proportion to their respective values.² And where there was a mortgage, accompanied with eight bonds payable at different times, five of which the holder assigned to different persons, at several times, retaining three of them himself; and the mortgaged premises were subsequently sold under an execution against the mortgagor, and the proceeds were insufficient for the whole mortgage debt, it was decided that the respective assignees and the mortgagee were entitled to a *pro rata* dividend of the proceeds according to the amount of the bonds held by each.³

§ 138. Another important branch of equity jurisdiction, in cases of apportionment and contribution, is where incumbrances on real estate are required to be paid off, or are actually paid off, by some of the parties in interest. In such cases the rule has been adopted in equity, that one-third should be contributed by the owner of the life estate and the remaining two-thirds by the reversioner or remainder-man. Thus, where A., having purchased a

¹ Nailer v. Stanley, 10 S. & R. 435; Cowden's Estate, 1 Barr, 274; Carpenter v. Koons, 8 Harris, 226; Clowes v. Dickinson, 5 Johns. Ch. 440; Mevey's Appeal, 4 Barr, 80; Dunn v. Olney, 2 Harris, 222-3.

² Carpenter v. Koons, 8 Harris, 222; Fisher v. Clyde, 1 W. & S. 544.

³ Donley v. Hays, 17 S. & R. 400; Mohler's Appeal, 5 Barr, 420; Perry's Appeal, 10 Harris, 45.

life estate in certain lands, confessed a judgment in favour of B. and subsequently became the purchaser in fee, from a different vendor, of one half of the same land, and then confessed a judgment to C.; his interest in the land having been afterwards sold on execution, it was held that B's. judgment was to be regarded as a lien on the life-estate only; which was to be estimated at one-third the value of the fee simple estate, including the life-estate.¹

§ 139. Cases of general average form another class, which forcibly illustrate the value of this branch of equity jurisdiction. General average, or general contribution, is founded on principles of justice and sound policy. It arises, when a sacrifice of part has been made for the preservation of the residue, or when money is expended, to preserve the whole. Thus, the loss occasioned by cutting away of masts, by throwing goods overboard to lighten the ship in a storm, or money paid to redeem the ship and cargo, which has been captured, are subjects of general average; ship, cargo, and freight have been benefited, and therefore all must contribute.² In order to make a case of general average, it is necessary that the ship should be in distress, and a part sacrificed in order to preserve the rest. It is necessary also, that this sacrifice should be *conducive* to the saving of the rest, and that it should be *voluntary*; for if the loss be occasioned by the violence of the tempest, there is no reason for contribution.³

§ 140. Cases of contribution between sureties, one of whom, upon the default of their principal, has been compelled to pay the money for which they were all bound, are within the same rule of equitable jurisdiction. It is

¹ Dennison's Appeal, 1 Barr, 201.

² Sansom v. Ball, 4 Dall. 462.

³ Sims v. Gurney, 4 Binn. 524; Ins. Co. of N. America v. Jones, 2 Ibid. 559.

a rule well established, that where any one or more of those who are co-sureties, have had to pay, as such, the debt of their principal, and he is unable to reimburse it, the loss arising therefrom must be borne equally by all of them. Hence has arisen the right to contribution. This right has been considered as depending rather upon a principle of equity than upon contract; but it may well be considered as resting alike on both for its foundation;¹ for although, generally, there is no express agreement entered into between joint sureties, yet from the uniform and almost universal understanding which seems to pervade the whole community, that from the circumstance alone of their agreeing to be, and becoming accordingly co-sureties of the principal, they mutually become bound to each other to divide and equalize any loss that may arise therefrom to either or any of them, it may with great propriety be said, that there is, at least, an implied contract.²

§ 141. Sureties are not only entitled to contribution from each other for money paid in discharge of their joint liabilities for their principal, but they are also entitled to the benefit of all securities which have been taken by one of them, to indemnify himself against such liabilities;³ and also to an assignment of the security against his principal and co-surety.⁴ That a surety who pays

¹ 1 Pars. on Cont. 31-2.

² Agnew v. Bell, 4 Watts, 32. At law, a surety can recover from his co-surety only that co-surety's aliquot part, calculated upon the whole number, without reference to the insolvency of others of the co-sureties; but, in equity, it is otherwise. 1 Pars. on Cont. 34.

³ 1 Story's Eq. § 499; Himes v. Keller, 3 W. & S. 404.

⁴ Yard v. Patton, 1 Harris, 287. Wherever one, not a mere volunteer, discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor: actual payment discharges a judgment or other incumbrance *at law*, but where justice requires it, we keep it afoot *in equity* for the safety of the paying surety. Cottrell's Appeal, Pittsburgh Leg. J. 1 July 1851.

the debt of his principal is entitled to the benefit of all the securities within the power of the creditor, is a doctrine acknowledged in this state, unembarrassed by the difficulties that elsewhere have obtained in respect to such securities as might be esteemed as discharged at law. Following the older decisions of the English chancery, our courts have ever held, that though there be but one security of the debt paid by a surety, equity will preserve its validity for the benefit of such surety, for "what is very payment at law may not be payment at all in equity."¹ They have even gone further than this, by asserting a similar equity in favour of a co-surety, in a joint judgment of one of several purchasers of land, incumbered by a joint judgment, afterwards paid by that one; and for the protection of a mortgagor who aliened the mortgaged premises with covenant that the alienee should assume the incumbrance.²

§ 142. There are many other cases of contribution within the cognizance of a court of equity. Thus, on the dissolution of a partnership, a bill for contribution will lie by one of the several partners against the others, for a proportionate part of the loss sustained by the transactions of the firm.³ And in general, it has been found, that the remedy in equity is so complete, in cases of apportionment and contribution, as to have superseded, in a great measure, the action of account render, which is said to be "cumbrous, ill-defined, and not so well

¹ *Croft v. Moore*, 9 Watts, 451.

² *Gossin v. Brown*, 1 Jones, 531-2; *Fleming v. Beaver*, 2 Rawle, 128; *Pott v. Nathans*, 1 W. & S. 155; *Bank of Pennsylvania v. Potius*, 10 Watts, 148; *Lathrop's Appeal*, 1 Barr, 512; *Duncan v. Drury*, 9 Barr, 332; *Champlin v. Williams*, *Ibid.* 341; *Morris v. Oakford*, *Ibid.* 498.

³ *M'Fadden v. Sallada*, 6 Barr, 283; *M'Fadden v. Hunt*, 5 W. & S. 468; *Horbach's Administrators v. Elder*, 6 Harris, 36-7.

adapted to all the exigencies of partnership concerns as the proceeding in chancery.”¹

§ 143. Another class of cases in which a court of equity will decree an account, is that arising from adverse claims and titles to real estate. Thus, where lands have been extended and delivered to the judgment creditor under the extent, a bill for an account will lie by the owner of the lands as well as by the creditor; and, in such case, the valuation of the inquest being but *prima facie* evidence of the annual value of the property, the creditor is accountable only for what he actually received, if he used skill and diligence in the collection of the rents and profits.² So in cases of waste, if discovery be requisite, the court will, as incidental to that assistance, compel an account; and where the waste arises from the working of mines, an account may be decreed, although not founded on the discovery sought by the bill.³

§ 144. There are some matters incident to the exercise of the remedial jurisdiction of courts of equity, in all matters of account, which it will be proper to notice before concluding the examination of the subject matter of this chapter. Thus, in all bills for an account, both parties are deemed actors; and therefore, although in general no person but a plaintiff can entitle himself to a decree; yet, in a bill for an account, if a balance be ultimately found in favour of the defendant, he is entitled to a decree for such balance against the plaintiff;⁴ and, for a like reason, although a defendant cannot ordinarily revive a suit which has not proceeded to a decree; yet,

¹ *McFadden v. Sallada*, 6 Barr, 290.

² *McKely v. De Wolfe*, 8 Harris, 374, 381.

³ *Jcr. Eq.* 509-10.

⁴ *Shollenberger's Appeal*, 9 Harris, 340.

in a bill for an account, if the plaintiff die after an interlocutory decree to account, the defendant is entitled to revive the suit against the personal representatives of the plaintiff.¹

§ 145. So also there are some matters of defence peculiar to cases of account. Thus, if there have been an account stated between the parties, it may be pleaded as a bar to both discovery and relief, or may be set up by answer as a bar to relief; and in this latter case, if the allegation in the answer be not proved, it is usual, on referring the account to the master, to direct that, if he find any account stated he shall not disturb it. The account, however, may be opened on the ground of fraud, or if important errors be specified and proved; but a general allegation that it is erroneous will not suffice. In some cases, where a stated account is impeached, the court will re-open the whole account and direct it to be taken *de novo*. In others, where it is faulty in a less degree, it will allow it to stand, with liberty to surcharge and falsify. This leaves it in full force as a stated account, except so far as it can be impugned by the opposite party. If he show the omission of a credit, that is a surcharge; if he show the insertion of an improper charge, that is a falsification.²

¹ 1 Story's Eq. § 522.

² Adams' Eq. 226-7; *Bainbridge v. Wilcocks*, 1 Bald. 540. An account stated is conclusive upon the parties, unless fraud or mistake be affirmatively shown. If either party attempt to impeach the settlement and to open the account for re-examination, either wholly or in part, and which can only be done upon the ground of fraud, mistake, or error, the burden of proof rests upon the party impeaching, and he must prove the fraud, or point out the error or mistake on which he relies. *Lockwood v. Thorne*, 1 Kern. 175; *Phillips v. Belden*, 2 Edw. Ch. 1. No practice can be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestions supported by doubtful, or only probable testimony. *Chappedelaine v. Dechenaux*, 4 Cranch, 306.

§ 146. The question of what will constitute a stated account is, in some measure, dependent on the circumstances of the case. The mere delivery of an account, without evidence of contemporaneous or subsequent conduct, will not prove it to be a stated account; but an acceptance, implied from circumstances, will suffice. Between merchants, at home, an account which has been presented, and which has not been objected to after the lapse of several posts, is treated, under ordinary circumstances, as a stated account. Between merchants, in different countries, a similar rule prevails; and if an account be transmitted from one to another, showing a balance due to himself, and he do not object to it in a reasonable time, the rule is to consider it as allowed.¹

§ 147. It is also material to the equity for an account that it be claimed within the proper time. Where the account is sought under a legal title, or under an equitable title of like nature with a legal one, that limit of time will be adopted in equity which is prescribed by the statute of limitations at law. Where the bar of the statute is inapplicable, there may, nevertheless, be a bar in equity, originating in long acquiescence by the party, and in the consequent presumption that he has either been satisfied his demand, or that he intended to relinquish it.² And in a case where the account was carried back into remote transactions, of which accounts had been regularly kept by a deceased party at the time, it was ordered that they should be received as *prima facie* evidence, so as to throw on the other side the burden of impeaching them.³

¹ Phillips v. Tapper, 2 Barr, 323; Jones v. Dunn, 3 W. & S. 109; Thompson v. Fisher, 1 Harris, 313; Mellon v. Campbell, 1 Jones, 418; Bainbridge v. Wilcocks, Bald. 536; Lockwood v. Thorne, 1 Kern. 173.

² Adams' Eq. 227.

³ Cholmer v. Bradley, 1 J. & W. 51-65.

CHAPTER VII.

ADMINISTRATION.

§ 148. THE orphans' courts are, in Pennsylvania, invested with full equity jurisdiction in the administration of the assets of deceased persons.¹ The word assets includes all property of the deceased which is chargeable with his debts and legacies, and is applicable for that purpose. Lands also have, from a very early period, been deemed assets for the payment of debts:² and hence, whenever it satisfactorily appears to an executor or administrator, that the personal estate of his decedent is insufficient for the payment of the debts and the expenses of the administration, it is his duty to proceed, without delay, to sell, under the direction of the proper orphans' court, so much of the real estate as shall be necessary to supply the deficiency.³

§ 149. The proceedings for the due settlement of the administration may, and usually are, instituted by the executor or administrator himself, for his own protection. In such case, he must exhibit a just and true account of his administration into the office of the register of the proper county, whose duty it is, before allowing the same, carefully to examine it, and to require the pro-

¹ Purd. Dig. 621.

² *Guier v. Kelly*, 2 Binn. 298; *Cowden v. Brady*, 8 S. & R. 508.

³ Purd. Dig. 200.

duction of the necessary vouchers, and other satisfactory evidence of the several items of such account. Having been allowed and filed by the register, a certified copy of the account is to be prepared and presented to the orphans' court, at its next stated meeting, occurring not less than thirty days thereafter, of which the register is to give public notice. Any party interested may exhibit exceptions to the account, which in such case, if deemed necessary by the court, is to be referred to auditors for adjustment; and in case of deficiency of assets, to report distribution.¹

§ 150. If the executor or administrator neglect to file his account, within one year after the granting of letters testamentary or of administration, any creditor or person interested in the estate, may present a petition to the orphans' court, briefly setting forth the facts, and praying a citation to such executor or administrator to settle his account: this petition must be verified by oath or affirmation. On the return of the citation, if the defendant appear and answer, the court, if the facts are not disputed, or the time elapsed be not sufficient to raise a legal presumption that the estate has been fully settled, will make a decree for an account, which may be enforced by attachment or sequestration. On the coming in of the account the proceedings are the same as in case of a voluntary settlement. In case the defendant do not appear to the citation, the court is empowered to decree that the petition of the complainant be taken as confessed, and to direct a reference to an auditor or auditors to take proof of the facts and circumstances set forth in the petition, and to report thereon,

¹ Ibid. 210-11. In Philadelphia county all accounts are to be so referred. Ibid. 211.

and also to report an account against such defendant, if necessary.¹

§ 151. A creditor, though entitled to object to the credits or charges in an administration account exhibited for settlement, cannot go into the orphans' court to recover his debt against a solvent estate. It is the executor, and not the court, that administers the assets. The remedy is not in equity, but at law; and the personal representative of the decedent is, for purposes of personal recourse, entitled to trial by jury, and every other constitutional advantage, which might have been insisted on by him whom he represents. The orphans' court has doubtless power to make distribution, but not among creditors. It can be made only when the debts are paid, and the accounts settled; consequently, only when there is no creditor to claim.² Where however the estate is insolvent, the court is authorized to appoint auditors to settle and adjust the rates and proportions of the assets to and among the respective creditors, according to the order established by law.³ The rights of distributees and legatees, as between each other, are not affected by the administration account.⁴

§ 152. Where the distinction between legal and equitable assets is recognised, the due administration of them becomes a fruitful source of equity jurisdiction. But in Pennsylvania there is no distinction between legal and equitable creditors, or legal and equitable assets derived from the estate of a decedent, and in the hands of his personal representatives for distribution among creditors.

¹ Ibid. 622.

² Warner's Estate, 2 Wh. 301; Metts' Appeal, 1 Wh. 7; Latimer's Estate, 2 Ash. 520; Gossner's Estate, 6 Wh. 401.

³ *Purd. Dig.* 211.

⁴ Ake's Appeal, 9 Harris, 320.

Therefore, when a party dies intestate, leaving separate and joint creditors, and there is no joint fund, or solvent partner surviving, the separate and joint creditors have a right to come in, under the intestate laws, *pari passu*, for a distributive share of the separate estate.¹

§ 153. The established order of the application of the several funds, liable to the payment of debts, is as follows: 1. The general personal estate, not expressly, or by implication, exempted. 2. Lands expressly devised to pay debts. 3. Estates descended to the heir. 4. Devised lands, charged with the payment of debts generally, whether devised in terms general or specific, (every devise of land being in its nature specific.) 5. General pecuniary legacies, *pro rata*. 6. Specific legacies, *pro rata*. 7. Real estate devised, whether in terms general or specific.²

§ 154. The equity of marshalling the assets arises, where debts or legacies are charged, some on several kinds of assets, and some on one kind only, and the doubly charged assets have been applied in discharge of the doubly secured claims. Thus, where a testator directed his executors to sell a particular portion of his lands, and after deducting three hundred dollars from the proceeds, to divide the residue in equal portions among his daughters; he then directed the three hundred dollars so reserved to be divided among his three grandchildren; and gave the residue of his lands to his widow and son; the widow, as surviving executrix, having sold the lands charged with the legacies, for the payment of debts, and applied more than three hundred dollars of the proceeds, in ease of her own estate; it was held, that

¹ Sperry's Estate, 1 Ash. 347.

² Hoover v. Hoover, 5 Barr, 356-7.

the legacies to the grand-children were demonstrative, and payable out of the three hundred dollars reserved out of the proceeds of the land ordered to be sold; that these legacies were not liable to abate from a deficiency of personal assets to pay the debts, but that the lands devised and the legacies to the daughters must contribute to such deficiency; and that the orphans' court had power to settle the contributory shares payable by the devisee and legatees, and to compel payment thereof.¹

§ 155. In marshalling the assets for the payment of debts, a mortgage created by the decedent, like all other contracts for the payment of money, must be paid out of the personal effects of the deceased. But where the estate originally came into the hands of the testator, charged with a pre-existing mortgage, the devisee of such land takes it charged with the mortgage debt; although the decedent covenanted with his vendor to pay the mortgage, and to indemnify him from its payment.² The general principle is, that the personal estate is the proper fund for the payment of the testator's debts, and shall be first applied even to the payment of debts with which the real estate is charged. Thus, if a testator borrow money and mortgage his land for it, and then die, the heir or devisee may call upon the executor to exonerate the land, by an application of the personal assets to the discharge of the mortgage. But there is a distinction between debts originally contracted by the testator and those contracted by another, for in the latter case the land is considered as the debtor, and shall bear its own burden.³ Unless, indeed, the testator has so dealt with

¹ Loomis's Appeal, 10 Barr, 387; *Alston v. Munford*, 1 Brock. 267; *Byrd v. Byrd's Executor*, 2 Ibid. 169.

² *Mason's Estate*, 1 Pars. 129; *Hocker's Appeal*, 4 Barr, 497; *Hickling v. Boyer*, 9 Eng. L. & Eq. 212.

³ *Keyzey's Appeal*, 9 S. & R. 72-3.

the incumbrance as to make it his proper debt. To produce this result, so as to charge his personal estate as the primary fund for the payment of such an incumbrance, the testator must have made himself, by contract, personally and directly liable at law to the owner of the incumbrance.¹

§ 156. At common law, the executor or administrator is treated, for many purposes, as the owner of the assets, and has power to dispose of and alien them. In chancery, however, his interest is purely fiduciary; and the law exacts from those dealing with him, with full knowledge of his representative character, the most perfect good faith. The assets are a fund in his hands, not for the payment of his own debts, but the debts of the testator and the legacies bequeathed in the will; and where the assignee knows, at the time, that he is receiving his debt out of a fund which is not the property of the person paying, but which is appropriated to the payment of other debts, that alone is a circumstance of suspicion that ought to put him on inquiry as to the propriety of the transaction.² The law is now clearly settled, that an executor can make no valid sale or pledge of the assets of his testator, for the payment of his own debts or those of a third person. And if any one deal with another, standing in this fiduciary character, he is affected with notice, and is consequently participant in the breach of trust.³ It is no answer to say, that the executor may sell the goods, and pay his debt with the price; if the creditor knew that the payment made under these circumstances would prejudice the creditors or legatees, he would be a party to the *devastavit*, and liable to refund; for

¹ Mansell's Estate, 1 Pars. 370; Cumberland v. Codrington, 3 Johns. Ch. 272.

² Petrie v. Clark, 11 S. & R. 386.

³ Miller v. Ege, 8 Barr, 356.

money, where it has been received *malâ fide*, may be followed as readily as a chattel.¹

§ 157. An administrator, appointed in another state, is merely ancillary to the administrator of the place of the domicil; and it is the duty of the former to transmit the assets, after payment of debts and expenses, to the latter for distribution; and if the latter neglect to demand the sum which should be transmitted to him, and it is lost, he is chargeable. Where the administration, both at home and abroad, has been taken out by the same person, the presumption is, that he has done his duty; and when he comes to settle his account in the state where distribution is to be made, he cannot deny that he has received, what the foreign administrator, if he had been a different person, would have been compelled to pay, and what he would have been bound in duty to demand and get. Equity considers that done which ought to be done.²

§ 158. But, an administrator here, though admitted to be but ancillary to the administrator at the place where the decedent was domiciled, is bound to remit the assets to be administered there, only in case there are no domestic claimants in the character of creditors, legatees, or next of kin; where these appear, the assets are to be retained for administration according to our own laws, permitting the foreign creditors to participate in proportion to their debts, respect being had to the aggregate of the estate, and of the debts, whether foreign or domestic.³ And where the parties interested, whether foreign creditors, legatees, or next of kin, seek their remedy here, it

¹ *Petrie v. Clark*, 11 S. & R. 387; *Marshall v. Hoff*, 1 Watts, 441.

² *Stokely's Estate*, 7 Harris, 482.

³ *Mothland v. Wireman*, 3 Penn. R. 188.

is in the legal discretion of the court either to decree a distribution here, or to remit the fund to the administrator of the domicil, according to the circumstances and condition of the estate.¹

§ 159. In concluding this subject, it may be proper to remark, that although it is provided by statute that no foreign letters testamentary, or of administration, shall confer upon the party any of the powers and authorities possessed by an executor or administrator, under letters granted within this state; yet it has been held, not to be necessary to take out letters of administration in Pennsylvania, on the estate of one who, at the time of his decease, was domiciled in another state, in order to collect a claim against a resident; in such case, the administrator of the domicil may maintain an action. Any rule which would exclude the administrator from our courts, would also exclude his intestate, if alive, which would certainly be a gross violation of comity between the states of this union.²

§ 160. In regard to legacies, which, in England, are cognizable in equity, our statutes have provided a remedy by a common law action against the executor; which jurisdiction is exclusive.³ Where, however, a legacy is charged upon, or payable out of land, the jurisdiction has been given to the orphans' court. In such

¹ Dent's Appeal, 10 Harris, 514.

² Doud v. Wolf, Dist. Court, Allegheny, Pittsburgh Leg. J. 15 April 1854.

³ Purd. Dig. 213; Galloney's Appeal, 6 Barr, 40. An action for a legacy being a substitute for a bill in equity, is to be so managed as to take effect without hindrance from common-law technicalities: hence, an action brought in the name of executors for the use of a legatee, against another legatee, to recover the one-third of a legacy which had been limited over, upon a contingency, to three legatees, will not be defeated by the plea of a former recovery by the same executors, for the use of another of the three legatees. Seibert v. Butz, 9 Watts, 490.

case, the legatee may apply, by bill or petition, to the court having jurisdiction of the accounts of the executor of the will by which such legacy was bequeathed; whereupon, the court, having caused due notice to be given to the executor, and to the devisee or heir, as the case may be, of the estate charged with the legacy, and to such other persons interested in the estate as justice may require, may proceed, according to equity, to make such decree or order, touching the payment of the legacy out of the real estate, as may be requisite and just.¹ To such a proceeding, the alienees of a devisee are necessary parties.²

§ 161. Cases frequently occur in practice, in which annuities and legacies payable *in futuro*, or upon contingencies, are charged upon all the residuary real estate of the testator, which is thereby in some measure rendered inalienable, although such annuities and legacies might be amply secured by setting apart a portion of the estate. In any such case, the executors, or the annuitant, or legatee, or any person interested in the residuary estate, are authorized, by the act of 23d February 1853,³ at any time after the expiration of one year from the granting of letters testamentary, to apply by petition to the orphans' court having jurisdiction of the accounts of the executors, setting forth the facts and praying relief; whereupon the court may order a citation to be issued to the parties interested, to appear at a day certain to show cause why the relief prayed for should not be granted. And upon the return of such citation, if all the parties interested shall have had due notice, the court may refer the case to an auditor with directions to inquire

¹ Purd. Dig. 214.

² Jenkins v. Jenkins, 7 Barr, 246.

³ Purd. Dig. 214.

into the circumstances, and report upon the amount and condition of the estate, and upon the expediency and propriety of exempting any part of the residuary real estate from the lien and charge of such annuities and legacies, having due regard to their ultimate security; and, upon such report being made, and due notice thereof given to all persons interested, if it shall further appear that all the debts of the testator have been paid or secured, the court may make a decree that such parts of the residuary estate shall be set apart for the payment of the annuities and legacies, as shall appear to be, and with reasonable probability will continue to be, sufficient for that purpose beyond all charges and deductions; providing always a sufficient surplus, to meet any contingent diminution or depreciation in the value or income of the estate and securities so set apart.

§ 162. When such decree shall have been made, the court may further order that all the remaining residuary real estate, not so set apart, shall be discharged from the lien of every such annuity or legacy, in the hands of any *bonâ fide* purchaser thereof for a valuable consideration. This, however, will not authorize the exoneration of any real estate which the testator may have specifically charged with the payment of the annuity or legacy. If any such annuity or legacy become extinguished, the court may decree the exoneration of such further part of the residuary estate, as may appear to be beyond the amount requisite for securing the payment of the remaining annuities and legacies.¹

¹ Purd. Dig. 214.

CHAPTER VIII.

DOWER AND PARTITION.

§ 163. THE courts before enumerated,¹ with the exception of the district court of Allegheny, have been invested, by statute, with all the powers and jurisdiction of courts of equity in cases of dower and partition.² And the orphans' courts throughout the state are likewise clothed with power to make partition of the real estate of a decedent between the widow and heirs.³ We will first consider the nature of the proceedings by bill in equity, and afterwards the statutory jurisdiction of the orphans' court, which is essentially equitable in its character.

§ 164. By the common law, the widow's right of dower, was a right to have assigned to her, on the death of her husband, a third part of the lands and tenements of which he was seised during the marriage, in fee simple, or fee tail, and which her issue (if any) might by possibility have inherited. Her remedy, at law, was by writ of dower, or of dower *unde nihil habet*, and the sheriff was appointed to assign it. The common law action of dower may be maintained in this state, for an assignment of the widow's dower in lands, which her husband had aliened in his lifetime, and in the conveyance of

¹ Ante, § 35.

² Purd. Dig. 306-7.

³ Ibid. 203.

which she did not join.¹ But where the husband died seised and possessed, an action of dower, at common law, cannot be sustained. In such case, the remedy must be by proceeding in the orphans' court, or by bill in equity.²

§ 165. By our intestate laws, the widow, where the intestate leaves issue, is entitled to one-third part of the real estate for the term of her natural life; where there is no issue, but collateral heirs, to one-half of the real estate, including the mansion house and buildings appurtenant, for the term of her life; and in default of known heirs or kindred, competent to inherit, the whole of the real estate shall be vested in the widow, for such estate as the intestate had therein.³ The shares thus allotted to the widow are to be in lieu and satisfaction of her dower at common law. And a devise or bequest by a husband to his wife of any portion of his estate, is to be deemed and taken to be in lieu and bar of her dower in the estate of the testator, unless he shall in his will declare otherwise; the widow may, however, elect to take her dower or the property so devised or bequeathed. She may be cited to appear in the orphans' court, and make such election at any time after twelve months from the death of the testator; and if she neglect to appear on such citation, it will be deemed an acceptance of the devise or bequest, and a bar of her dower. Such election, however, need not be made in the orphans' court, to estop a widow from claiming dower; if she, in fact, elect to take under the will, she will be barred.⁴ To

¹ *Leinaweaver v. Stoevers*, 1 W. & S. 160; *Borland v. Nichols*, 2 Jones, 38.

² *Thomas v. Simpson*, 3 Barr, 60.

³ *Purd. Dig.* 452-4.

⁴ *Cauffman v. Cauffman*, 17 S. & R. 16; *Light v. Light*, 9 Harris, 407.

enable her to make her election understandingly, she can compel the exhibition, by the executor, of a true inventory and fair account of the estate.¹

§ 166. Courts of equity now entertain a general concurrent jurisdiction with courts of law, in the assignment of dower in all cases.² The court will not, however, assist a widow in the assignment of her dower, out of her husband's estate, if there be any doubt as to her legal right; therefore, if the title to dower be disputed, it refers it to the decision of a court of law, either by directing an issue,³ or by ordering the bill to be retained for a certain time, with liberty to the plaintiff to bring a writ of dower, as she may be advised. When the right to dower is not disputed, the court of chancery assumes a concurrent jurisdiction, and will direct it to be assigned; first, however, if it be necessary, directing an inquiry by the master into what lands the husband died seised of wherein his widow is entitled to dower, &c. The right being established, and the property out of which the wife is dowable being ascertained, the next step is to assign the dower. This may be done either by reference to the master, or by directing a commission to issue. It generally forms part of the decree, that when the dower has been assigned, possession shall be delivered to the plaintiff.⁴

§ 167. A widow is also entitled to an account of the arrears of her dower, and this, notwithstanding the death of the heir pending the suit; although at law her right to damages would have been lost by that event. A court of equity will decree an account of rents and profits against the respective representatives of the several parties who may have been in possession since the death of

¹ Melizet's Appeal, 5 Harris, 449-50.

³ Conklin v. Bush, 8 Barr, 517-18.

² 1 Story's Eq. § 624.

⁴ 2 Dan. Ch. Pr. 1343.

the husband, provided, that at the time of the bill filed, the legal right to damages was not gone. And although the widow die before she has established her right to dower, equity will, in favour of her personal representative, decree an account of the rents and profits of the lands of which she may afterwards appear dowable. And these rules are founded in equity, for it would be unreasonable that the widow, or her personal representatives, should be debarred from damages when the heir happens to die before she has established her right, or where she dies before judgment in her favour, when the enjoyment of her dower is prevented by the wrongful act or forfeiture of the heir or feoffee. At law, the demandant recovers from the feoffee all the mesne profits of the land, without regard to the time he occupied it, for the law leaves him to provide a recompense or indemnity from the heir, which, if he neglect to do, it is his own folly. But, in equity, an account will only be decreed for the time the premises were in the actual occupation of the heir or feoffee.¹ The rule, however, that the personal representative of the widow may have an account in equity of the arrears of her dower, is confined to cases where the right to damages has been established by judgment, but the widow dies before they had been assessed.²

§ 168. Where the assignment of dower has been referred to the master, the same decree may direct an account of rents and profits; but where the assignment is by commission, it must be deferred till the cause comes on for further directions, with regard to the question of costs. Lord Redesdale observes, that "in the two cases of partition and assignment of dower, as no costs can be

¹ *Sandback v. Quigley*, 8 Watts, 464.

² *Conklin v. Bush*, 8 Barr, 518; *Seaton v. Jamison*, 7 Watts, 537.

given in a court of common law, upon a writ of partition, or a writ of dower, no costs have commonly been given in a court of equity, upon bills for the same purposes;" and, as respects dower, this appears to be the present rule of the courts, in cases where the widow comes into court for the single purpose of having dower assigned her. The rule, however, is subject to exception where previous questions are raised, in litigating of which the party is vexatious.¹

§ 169. In the case of partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in the proceedings at common law have led to applications to courts of equity for partition; which is effected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required; and upon return of the commission, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties.² But a court of equity does not interfere unless the title be clear; and never where the title is denied or suspicious, until the party seeking a partition has had an opportunity to try his title at law.³

§ 170. In making a partition in chancery, every part of the estate need not be divided, but it will be sufficient if each party have his proper share of the whole. Thus, where two-thirds of an estate belonged to the plaintiff and one-third to the defendant, and the estate consisted, amongst other things, of a mansion house and of farms and lands about it, and the defendant insisted that he

¹ 2 Dan. Ch. Pr. 1344; Beames on Costs, 35.

² Ibid. 1326.

³ 4 Kent's Com. 364-5; *Vint v. King*, 2 Am. L. R. 729.

was entitled to have one-third of each allotted to him, Lord Hardwicke said, that "although in making the partition care must be taken that the defendant should have a third part in value of the estate, there was no colour of reason that any part of the estate should be lessened in value, in order that the defendant should have his third part of it, which, if he should have one-third of the house and of the park, would very much lessen the value of both."¹ So, if there be three houses of different value to be divided amongst three, it will not be right to divide each house, for that would be to spoil every house; but some recompense should be made, either by a sum of money, or rent, for owelty of partition, to those who have houses of less value.² If the partition cannot be made without prejudice to the interests of the owners, the court may order a sale of the premises.³ And in order to ascertain whether the estate be capable of division, it is provided that, "the court may appoint, on the agreement or nomination of the parties, three or more commissioners to divide or value the same, with the same effect as a sheriff's inquisition for the same purpose; and decree a compensation for such service, not exceeding three dollars a day each, unless the parties interested shall have agreed in writing to a larger recompense."⁴

§ 171. The confirmation of the report of the commissioners does not, like the judgment on a writ of partition, operate on the actual ownership of the land, so as to divest the parties of their undivided shares, and re-invest them with corresponding estates in their respective allotments, but it requires to be perfected by mutual convey-

¹ Earl Clarendon v. Hornby, 1 P. Wms. 446.

² Ibid.

³ Purd. Dig. 699; Wood v. Little, 2 Am. L. R. 357.

⁴ Act 27 April 1855, § 4. P. L. 369.

ances; and the next step, therefore, after confirmation of the return, is a decree that the plaintiff and defendants do respectively convey to each other their respective shares, and deliver up the deeds relating thereto, and that in the mean time the allotted portions shall respectively be held in severalty. If any of the co-owners have settled or mortgaged their shares, directions will be given for framing the conveyance so that all parties shall have the same interests in the divided shares, which they before had in the undivided share. If the infancy of the parties or other circumstances prevent the immediate execution of conveyances, the decree can only extend to make partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made. If the defect arise from infancy, the infant must have a day, after attaining twenty-one years, to show cause against the decree.¹

§ 172. With respect to the costs of a partition, the general rule is now understood to be that which was pronounced by the court in giving judgment in the case of *Agar v. Fairfax*;² that as the party came into equity instead of going to law, for his own convenience, the rule of law should be adopted, and therefore no costs should be given until the commission; that the costs of issuing, executing, and confirming the partition, should be borne by the parties in proportion to the value of their respective interests, and that there should be no costs of the subsequent proceedings. Where one of the parties had made a lease of his undivided share, the costs of the lessee, who was a necessary party to the suit for the partition, were thrown exclusively upon the lessor, on the ground

¹ Adams' Eq. 232; *Jackson v. Edwards*, 7 Paige, 386.

² 17 Ves. 533, 558; see Brightly on Costs, 175.

that, as such lessee was entitled to his costs, his landlord, who had been the means of bringing him into court, was the proper person to indemnify him. The commissioners have no lien on the commission for their charges.¹

§ 173. The several orphans' courts are invested, by statute,² with power to make partition of the estate of a decedent, in all cases of intestacy; and also in cases of testacy, where any of the parties interested are minors, or the course of descent is not altered by the provisions of the will.³ Their jurisdiction likewise extends to all cases of testacy wherein the whole or a part of the real estate may be devised to two or more children; and to the partition of any undivided interest, in fee simple, in any lands or tenements of which any person shall die seised or possessed, as tenant in common, or joint owner with any other person or persons.⁴

§ 174. The petition for a division of the real estate of a decedent may be presented either by the widow, or by any lineal or collateral heir of the deceased having an interest in such real estate, if of full age, or if under age, by his guardian; and such application must be made to the orphans' court of the county where the real estate of the decedent is situated, or if the lands lie in different counties, to the orphans' court of the county in which the principal mansion is situate, or if there be no mansion or building on the lands, then to the court of the county in which the greater part of the land lies; praying for the appointment of seven or more disinterested persons, chosen by the parties, or when they cannot agree, for an inquest, to make partition of such real es-

¹ 2 Dan. Ch. Pr. 1340.

² *Purd. Dig.* 203-4.

³ *Waln's Appeal*, 4 Barr, 506; *Selfridge's Appeal*, 9 W. & S. 56.

⁴ *Purd. Dig.* 204.

tate.¹ A husband may petition in right of his wife;² and so may the alienee of an heir, either in his own name, or in the name of his vendor.³ All parties in interest must be named in the petition, decree, and notices, when known; but if it appear on oath, that the names or residences of any of the parties are unknown to the petitioner, the court may direct notice to be given to them by publication, describing such parties as near as practicable.⁴ And the judgment creditors of a third person, who claim that a portion of the land belonged to their debtor, may come in and require the petitioners to prove that the estate belonged to the deceased.⁵

§ 175. The duties of the seven men appointed to make partition, or of the inquest selected by the sheriff, are prescribed by the terms of precept issued on the petition; which directs them to make partition of the premises to and among the heirs and legal representatives of the decedent, in such manner and in such proportions as by the laws of this commonwealth is directed, if the same can be so parted and divided without prejudice to, or spoiling the whole; and if such partition cannot be made, then to inquire and ascertain whether the same will conveniently accommodate more than one of the parties, without prejudice to, or spoiling the whole; and if so, how many it will so accommodate, describing each part by metes and bounds, and returning a just valuation of the same; but if they shall be of opinion, that the premises cannot be so parted and divided as to accommodate more than one of the parties, then to value the whole of

¹ Purd. Dig. 203-6.

² *Eckert v. Yous's Administrator*, 2 Rawle, 136.

³ *Thomas v. Simpson*, 3 Barr, 71.

⁴ Purd. Dig. 204; *Ragan's Estate*, 7 Watts, 438.

⁵ *Simmons's Estate*, 7 Penn. L. J. 360.

the said real estate, having respect to the true valuation thereof, agreeably to law.¹

§ 176. It seldom happens that the land can, without prejudice, be parted amongst all the parties in interest; very seldom that it can be so parted with exact equality. Sometimes convenience and interest dictate its valuation as a whole; sometimes into a fewer number of shares than there are owners; and frequently it is carved into many small lots, with a view to advantageous sale, the process of partition being regarded rather as the means than the end. Each of these modes of proceeding is sanctioned by law.² If the decedent were possessed of an undivided interest in any lands as tenant in common, or joint owner, such interest must in all cases be valued and returned undivided; and if the decedent had other real estate, such undivided interest is to be valued and returned, either by itself, or in connexion with some other portion of the estate, valued as one of the purparts into which the whole real estate shall be divided.³

§ 177. If equal partition cannot be made, and the whole estate, or the several purparts into which it is divided, are valued and appraised, a rule is granted on the parties interested to appear, and accept or refuse the estate, or a share or portion thereof, at the valuation, or show cause why a decree should not be made for the sale thereof, or of such parts of the estate as shall not be so accepted; and thereupon, the court may order the same: 1. To the eldest son, if he be living; but if he be dead, to his children, if any, in the order of their birth, and preferring males to females; and in the like manner to his other lineal descendants in the same order. 2. If the

¹ Purd. Dig. 204-5; Dunlap's Forms, 530.

² Darrah's Appeal, 10 Barr, 210; Purd. Dig. 204-5.

³ Purd. Dig. 204.

eldest son, or his lineal descendants, do not accept the same, then to the second and other sons, or their lineal descendants successively, in the order of birth, in like manner. 3. If the second or other sons, or their descendants, do not accept the same, then to the eldest daughter or her lineal descendants. 4. If the eldest daughter or her lineal descendants, do not accept the same, then to the second and other daughters, or their lineal descendants successively, in like manner. Where the decedent leaves no lineal descendants, the like proceedings are to be had as to the collateral heirs.¹

§ 178. The alienee of the eldest son is entitled to the first choice; he succeeds as well to the right of choice as to the share of the estate.² So, a guardian may accept on behalf of his ward; and the ward is bound by the act of his guardian, and cannot, on arriving at full age, disaffirm it.³ If there be a life estate with remainder over, the remainder-man must be made a party to the partition, and has the right to accept the estate at the valuation, upon giving security for the payment of the annual interest to the tenant for life.⁴ If the estate lie in several counties, an heir who has elected to take in one county, has no right to a share in another, until it has been offered to all the other heirs in succession.⁵ The *right* to accept at the appraisement is gone by the neglect of the heirs to appear and accept on the return of the rule; and if the property have advanced in value, a second chance of election should not be allowed.⁶ If deemed advisable, the court may allot their shares to

¹ Ibid. 204-8.

³ Gelbach's Appeal, 8 S. & R. 205.

⁵ Ibid. 206.

² Ragan's Estate, 7 Watts, 438-42.

⁴ Purd. Dig. 207.

⁶ Wentz's Appeal, 7 Barr, 151.

the parties appearing, and permit the residue to remain undivided, subject to a future partition.¹

§ 179. The party taking the estate, or one of the purparts, at the appraisement, is required to pay or secure to the other parties their proportionate parts of the value of the estate, or such sum as shall be charged on the several purparts for owelty of partition. If the widow be living, her share is to remain charged upon the several purparts, and the legal interest thereof must be annually paid to her, during her natural life, in lieu of her dower, by the parties to whom the said real estate shall be adjudged; and the same may be recovered by the widow by distress, or otherwise, as rents are recoverable. Upon her death, the principal sum charged upon such purparts is to be paid to the persons legally entitled thereto.² The widow of a deceased co-tenant who died intestate, where there is no partition of the premises within one year after his decease, may apply by petition to the proper orphans' court, for an inquest, to appraise her share in the estate, having reference to the intestate's purpart; and upon the return of the inquisition and confirmation of the same, the valuation thereof will be charged upon the premises, until partition shall be made, and the annual interest thereof must be paid to her during life, by the persons holding such estate, and may be recovered by distress or otherwise, in like manner as in the case of a widow's share, charged upon real estate upon a partition. In case of a future partition the court may, by their decree, charge such valuation, in such manner as they shall deem just and equitable, upon the purparts of the premises, allotted in severalty.³

§ 180. Should all the heirs neglect, after due notice,

¹ Purd. Dig. 205-6.

² Ibid.

³ Ibid.

or refuse to take the estate, or any of the purparts thereof, at the valuation of the same, the court may make a decree authorizing and requiring the executor or administrator to expose the same to public sale, at such time and place, and on such terms, as the court may direct.¹ The administrator has no power to alter the terms of the sale from cash to credit;² he is the mere agent of the law for a special purpose;³ and any such arrangement is at the risk of himself and his sureties.⁴ Such sale is a judicial sale, and when confirmed by the court, is not liable to be impugned in a collateral proceeding, except for fraud.⁵ In case of the neglect or refusal of the executor or administrator to execute the order of sale, the court may appoint a suitable person trustee, for the purpose of making such sale.⁶

§ 181. A decree for the sale of real estate under proceedings in partition, must contain a direction that the share of the widow, if there be one, of the purchase money, shall remain in the hands of the purchaser during the natural life of the widow, and that the interest thereof be annually paid to her by the purchaser, to be recovered by distress, or otherwise, as rents are recoverable; which the widow shall accept in full satisfaction of her dower in the premises; and at her decease, that such share of the purchase money be paid to the persons legally entitled thereto.⁷ The decree creates a lien upon the land for the unpaid purchase money, independent of any mortgage or other security, which may have been taken for it; and such lien can only be discharged by

¹ Ibid. 208.

² *Eshelman v. Witmer*, 2 Watts, 263; *Vandever v. Baker*, 1 Harris, 126.

³ *Sage v. Nock*, 3 Am. L. J. 336.

⁴ *Eshelman v. Witmer*, 2 Watts, 264.

⁵ *Sackett v. Twining*, 6 Harris, 202.

⁶ *Purd. Dig.* 209.

⁷ Ibid. 208.

payment to the heir.¹ If any portion of the proceeds of such sale be payable to a married woman, such money will not be paid to her husband, unless the wife, upon a separate examination before one of the judges, shall so desire it.² If there be a life estate in the premises, the share of the tenant for life may be charged on the same or other real estate, under the direction of the court.³

§ 182. The decree as to the costs is, that they be paid by the parties concerned, in proportion to their respective interests.⁴ The decree for costs will not include the compensation of the attorney who conducted the proceedings;⁵ unless he were retained by the administrator, to act on behalf of the estate;⁶ in such case, his claim is payable out of the proceeds of the sale, or if it has been paid by the administrator, is to be allowed as a credit in his account.⁷

¹ *Hise v. Geiger*, 7 W. & S. 273.

² *Purd. Dig.* 209.

³ *Ibid.* 210.

⁴ *Ibid.* 204.

⁵ *Newbaker v. Alricks*, 5 Watts, 183.

⁶ *Cook's Estate*, 9 Leg. Int. 160.

⁷ *Drysdale's Appeal*, 2 Harris, 537.

CHAPTER IX.

MARSHALLING OF SECURITIES.

§ 183. THE marshalling of securities is another head of the concurrent jurisdiction of courts of equity. The general principle is, that if one party has a lien on, or interest in two funds, for a debt, and another party has a lien on, or interest in one only of the funds, for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course be necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights, or operate to the prejudice of the party entitled to the double fund;¹ or if the former have already satisfied his debt from the fund to which the latter could alone apply, equity will substitute him to the place of the former, so as to permit him to avail himself of the unappropriated fund.² In Penn-

¹ 1 Story's Eq. § 633; M'Ginnis's Appeal, 4 Harris, 447; Baily v. Brownfield, 8 Harris, 45; Coates's Appeal, 7 W. & S. 103.

² Gearhart v. Jordan, 1 Jones, 331; Dunn v. Olney, 2 Harris, 220; Neff v. Miller, 8 Barr, 349. A creditor, by bonds and notes, secured by a mortgage, may have recourse, in the first instance, to the personal estate of the debtor which has been assigned for the benefit of creditors, without preference; and though after an award by an auditor, in his favour, to a *pro rata* share of the personal estate, such a creditor, by direction of the court, proceeded upon the mortgage, and recovered the greater portion of his claim, it was held, that he was still entitled to such *pro ratu* dividend on his whole claim, and was not limited to a dividend on the balance remaining due. Morris v. Olwine, 10 Harris, 441; see Kittera's Estate, 5 Harris, 416.

sylvania, this equity is enforced by means of subrogation.¹

§ 184. But where the parties seeking the aid of the court are not creditors of the same common debtor, they cannot claim to have the funds marshalled, in order to have a larger dividend out of one fund for those who can claim only against that. For example, if a joint debt be due to one creditor by two persons, and a several debt be due by one of them to another creditor, and the joint creditor obtain a judgment against the joint debtors, and the several creditor obtain a subsequent judgment against his own several debtor, a court of equity will not compel the joint creditor to resort to the funds of one of the joint debtors, so as to leave the second judgment in full force against the funds of the other several debtor; unless indeed it should appear, that the debt, though joint in form, ought to be paid by one of the debtors only, or there should be some other supervening equity.²

§ 185. "If," said Lord Eldon, in *ex parte* Kendall,³ "A. has a right to go upon two funds, and B. upon one, *having both the same debtor*, A. shall take payment from that fund to which he can resort exclusively; that by these means of distribution, both shall be paid. This course takes place where both are creditors of the same person, and have demands against funds, the property

¹ "Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract or privity of any kind exists between the parties. Whenever one, not a mere volunteer, discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor. Actual payment discharges a judgment or other incumbrance, *at law*, but where justice requires it, we keep it afoot in equity for the benefit of the paying surety." Woodward, J., in *Cottrell's Appeal*, Pittsburgh Leg. J. 1 July 1854.

² *Ebenhardt's Appeal*, 8 W. & S. 331.

³ 17 Ves. 514.

of the same person. But it was never said, that if I have a demand against A. and B., a creditor of B. shall compel me to go against A., without more; as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all the obligations arising out of these complicated transactions may be satisfied; but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity, giving B. the right, for his own sake, to compel me to seek payment of A.”¹

§ 186. Yet, when the funds, or subjects of lien, belong to different persons, and the debt, which is a lien on both of them, or any part of it, ought in justice to be paid by one of them in relief of the other, chancery will aid the interest of a creditor of the latter fund, against an appropriation of it in lieu of the fund primarily liable. Thus, if a judgment be recovered against A. and B., the latter being merely the surety of the former, for satisfaction of which B's. land is sold, and his separate lien creditors thus deprived of the means of payment, they are entitled to be subrogated to the place of the joint judgment creditors, so as to be let in on the land of the principal debtor, even against subsequent incumbrances. So also, if the judgment debtors be partners, and on a settlement of accounts between them, it turn out that one ought to pay the full amount of the judgment in

¹ *Dunn v. Olney*, 2 Harris, 221. Where A. and B. are acceptor and drawer of bills of exchange, and property of the one comes to the hands of the other, to be held as security against the bills, the bill-holders have a right to have the property applied exclusively, in the first instance, in payment of the bills; although the property so held be insufficient to pay the bills in full. *Ex parte Waring*, 19 Ves. 345; *Powles v. Hargreaves*, 23 Eng. L. & Eq. 57.

discharge of the other's estate. For the same reason, the rule embraces purchasers in common of an estate bound by a joint lien; as between themselves, the purpart of each is liable to contribute only its proportion toward the discharge of the common burden, and beyond this, is to be regarded simply as the surety of the remaining purparts; in this respect, they are to be treated as the several estates of joint debtors, one being surety of the other; and if the purpart of the one be called on to pay more than its due proportion, the tenant, or his lien creditors, is entitled to stand in the place of the satisfied creditor, to the extent of the excess, which ought to have been paid out of the other shares.¹

§ 187. This doctrine was so applied where a purchaser of part of a tract of land, incumbered by a mortgage, was subrogated to the rights of a mortgagee, whom he had been compelled to pay, as against his co-tenants;² and the rule would be the same, even against the subsequent lien creditors of the defaulting tenant.³ So, where the proceeds of a sheriff's sale of the land of a surety have been applied to the payment of the judgment against the principal, the judgment creditors of the surety have an equity to be subrogated as against the principal to the debt thus created, and to the lien of the first judgment; and have priority of claim in the order of their respective judgments, to the extent that they were deprived of the proceeds of the surety's lands, by reason of the prior judgment due by the principal.⁴ And so also where a surety obtained from the principal an assignment of a mortgage, as an indemnity, from which he received a certain sum; and the lands of his

¹ Gearhart v. Jordan, 1 Jones, 331-2.

² Champlin v. Williams, 9 Barr, 341.

³ Morris v. Oakford, 9 Barr, 498.

⁴ Neff v. Miller, 8 Barr, 347.

co-surety were sold to pay the debt of the principal; it was held, that the creditors of such co-surety, whose liens were disappointed by the sale, had the right, with the consent of the co-surety, to be subrogated on the judgment held by the original creditors against the surety, to the extent of one-half of the amount thus received by him from the mortgage, and applied to the payment of the joint liabilities of the sureties which had been satisfied; and that they were also entitled to be subrogated for the whole amount of a fund remaining in his hands, received from the estate of the principal, to be applied to such liabilities which were satisfied.¹

§ 188. The same principle was applied in a case where A. was the holder of certain judgments which were the first incumbrances, and B. the holder of a judgment which was a junior incumbrance to A's., on two properties of the debtor; and A. agreed with two of the purchasers of one of the properties of the debtor, in order to release the property purchased from the lien of his judgments, to accept, in the place of the existing judgments, another judgment, to be entered as a lien against the remaining property of the grantor, in consideration of which the two grantees covenanted to indemnify A., as to his subsequent judgment, against all prior incumbrances, and to make it the same as if it were a first lien; afterwards, the remaining property of the debtor was sold under A's. judgment, but the proceeds were applied to the satisfaction of B's., which by reason of such arrangement became the prior lien: it was held, that the court would not compel A. to look to his covenant, but that, by the breach of their covenant, A. became entitled, as against the grantees, to be subro-

¹ Moore v. Bray, 10 Barr, 519.

gated to the judgment of B. so as to bind their interest in the property released; and that it did not affect A's. right to be indemnified, that he was the purchaser, at sheriff's sale, of the remaining property of the debtor, and had sold at an advance.¹

§ 189. Where however, the original debt springs from a partnership transaction, there can be no substitution before a settlement of the partnership accounts.² Under such circumstances, a court of equity will not compel a joint creditor to resort to one of his debtors for payment, so as to leave the estate of the other debtor for the payment of his separate and several debt, for, as between the two debtors, this might be inequitable; and the equity subsisting between them ought not to be sacrificed merely to promote the interest of the separate creditor; nor will chancery, for the same reason, substitute the several to the place of the joint creditor, who has compelled payment from the estate of the debtor of the former.³

¹ *Dunn v. Olney*, 2 Harris, 221.

² *Sterling v. Brightbill*, 5 Watts, 229.

³ *Neff v. Miller*, 8 Barr, 349.

CHAPTER X.

CORPORATIONS AND PARTNERSHIPS.

§ 190. THE supreme court, and the several district courts, and courts of common pleas are invested, by statute, with all the jurisdiction and powers of a court of chancery, so far as relates to "the supervision and control of all corporations, other than those of a municipal character, and unincorporated societies or associations, and partnerships."¹ The equity powers of our courts, in respect to individuals, are circumscribed within a limited sphere, but over corporations, unincorporated associations, and partnerships, their equity jurisdiction is general and unlimited. The statute gives the courts *all* the powers and jurisdiction of a court of chancery, in such cases, to be exercised in the ordinary mode in which a court of chancery acts, whether by bill, injunction, or otherwise, as the equity of the case may require.² They have no jurisdiction, however, over a foreign corporation, which has no legal existence out of the boundaries of the sovereignty by which it was created; the official functions of its agents and officers do not follow them, so as to authorize the service of process upon the corporation.³

¹ Purd. Dig. 305-6, 1071.

² *Com. v. Bank of Pennsylvania*, 3 W. & S. 193; *Bevans v. The Turnpike*, 10 Barr, 176; *Baptist Church v. Scannell*, S. C. Pittsburgh Leg. J., 19 Aug. 1854.

³ *Bank of Virginia v. Adams*, 1 Pars. 534.

§ 191. One of the most common instances of the interference of courts of equity, in the control of corporations and partnerships, is that of a bill to restrain them from disposing of the corporation or partnership property for other objects than those contemplated in their charter or articles of partnership. It is an admitted principle, that in partnerships, and joint stock associations, they cannot, by a vote of the majority, change or alter their fundamental articles of co-partnership or association, against the will of the minority, however small, unless there be an express or implied provision in the articles themselves that they may do it. It is equally well settled, that a court of chancery will, upon the application of an individual member of a partnership or joint stock association, restrain, by injunction, the majority from using the funds or pledging the credit of the partnership or association in a business not warranted, and not within the scope of their fundamental articles of agreement.¹

§ 192. Courts of equity treat such proceedings by a majority, as a fraud upon the other members, which they will neither sanction nor permit. It was upon this principle that Lord Eldon, upon the application of an individual member of a company which had been organized for the purpose of carrying on a fire and life insurance business, restrained the company by injunction from embarking also in the marine insurance business; though the applicant had paid into the funds of the company only £150, as a deposit upon fifteen shares, and the company was gotten up by the Rothschilds, and composed of six or seven hundred individuals, with a capital of five

¹ *Stevens v. Rutland and Burlington Railroad Co.*, 1 Am. L. R. 156.

millions sterling.¹ It is settled, beyond controversy, that companies possessed of funds for objects which are distinctly defined by statute, cannot be allowed to apply them to any other purpose whatever, however beneficial or advantageous it may appear, either to the company, or the individual members of it.²

§ 193. Even where a corporation has procured from the legislature, by a supplemental act, authority to make a fundamental change in its charter, the rights of an individual corporator, as such, who does not assent thereto, are not thereby affected, although the act be accepted by the vote of a majority of the corporation. The circumstance of the defendants' acting under colour of law simply, can form no justification. If a law be unconstitutional, it can give no authority. Where it is clearly shown that a corporation is about to exceed its powers, and to apply its funds or credit to some object beyond its legitimate authority, it would, if the purpose of the corporation were carried out, constitute a breach of trust; and a court of equity cannot refuse to give relief by injunction.³ The court will always interfere to prevent a disposition of corporation property for other than corporate purposes.⁴

§ 194. A corporation, being a mere creature of the law, possesses only those faculties which are imparted to it by the charter of its creation, either expressly, or impliedly as necessary to its existence.⁵ And the rule of construction is, that any ambiguity in the charter of the company must operate against them and in favour of the

¹ *Natusch v. Irving, Gow on Partn.* Appendix, p. 576.

² *Munt v. Shrewsbury and Chester Railway Co.*, 3 Eng. L. & Eq. 150.

³ *Stevens v. Rutland and Burlington Railroad Co.*, 1 Am. L. R. 168-9.

⁴ *Langolf v. Seiberlitch*, 2 Pars. 64; and see *Thomas v. Ellmaker*, 1 Pars. 113.

⁵ *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. 235.

public:¹ a doubtful charter does not exist; because whatever is doubtful is decisively certain against the corporation.² This is a doctrine which courts of equity are continually called on to enforce. Thus, a railroad company has been enjoined from constructing a road which it was only authorized to do, on the failure of another company to avail itself of its corporate privileges within a certain period;³ from locating its road with a different terminus than that prescribed in its charter of incorporation;⁴ from obstructing a public street contrary to the provisions of its charter;⁵ from extending its railroad to a different point, so as really to construct a new road;⁶ or from making an unauthorized subscription to the capital stock of another corporation.⁷ If they step one inch beyond their chartered privileges, to the prejudice of others, or of their stockholders, or offer to do any act without the prescribed preliminary steps, they are liable to be enjoined, irrespective of the amount of damage.⁸

§ 195. Although municipal corporations are excepted in the general grant of equity powers to the several courts of this state, they are, nevertheless, included in the special jurisdiction conferred in the courts before enumerated,⁹ for the prevention and restraint of the commis-

¹ Northern Liberties v. The Gas Company, 2 Jones, 321.

² Attorney-General v. Erie and N. E. Railroad Co., S. C. Pittsburgh Leg. J., 9 September 1854; Bank of Pennsylvania v. Com., 7 Harris, 155; Packer v. Sunbury and Erie Railroad Co., Ibid. 211; Pennsylvania Railroad Co. v. Canal Commissioners, 9 Harris, 22.

³ Packer v. Sunbury and Erie Railroad Co., 7 Harris, 211.

⁴ Attorney-General v. Erie and N. E. Railroad Co., *ut supra*; Com. v. Franklin Canal Co., 9 Harris, 117, 124.

⁵ Ibid.

⁶ Stevens v. Rutland and Burlington Railroad Co., *ut supra*.

⁷ Brown v. Co. Commissioners, 9 Harris, 37; and see Delaware and Hudson Canal Co. v. Pennsylvania Coal Co., Ibid. 131; Sharpless v. Mayor of Philadelphia, Ibid. 147; Moers v. City of Reading, Ibid. 188.

⁸ Com. v. Pittsburgh and Connelsville Railroad Co., S. C., 12 March 1855, MS.

⁹ Ante, § 35.

sion or continuance of acts contrary to law, and prejudicial to the interests of the community, or the rights of individuals.¹ And accordingly, if a corporation be grossly abusing its privileges, whether municipal or private, and encroaching upon the rights of individuals, the courts will interfere by way of injunction. Upon this principle the district court of Allegheny granted a perpetual injunction against the mayor and council of the city of Allegheny, to restrain the erection of buildings on a square, which had been dedicated to public use by the original proprietors; the acts of the corporation being shown to be injurious to the public and the rights of individuals, as well as in violation of law. This decision was, on appeal, affirmed by the supreme court.² So an injunction was granted to restrain the commissioners of Allegheny county from carrying on the excavation of a street, in pursuance of a new grade, whereby the walls of the court-house would be greatly endangered.³ And so also the city of Philadelphia was restrained by injunction from attempting to take possession of the city gas-works, and from interfering with the trustees thereof, in their control and management of the works and the income and other funds belonging to the same; the works and their income having been placed, by ordinance, in the hands of the trustees as a security for loans contracted in their erection.⁴

§ 196. Where the funds of a corporation are not whole and tangible, but consist in the liability of the members to be assessed, a court of equity will lend its aid in favour of a creditor of a company, to assist it in enforcing the

¹ *Purd. Dig.* 306.

² *Attorney-General v. Rush*, cited 1 *Pars.* 507.

³ *County of Allegheny v. Rowley*, 2 *Am. L. J.* 307.

⁴ *Western Saving Fund So. v. City of Philadelphia*, *Sup. Court*, 26 December 1854, *MS.*

payment of instalments required, by the members, and will apply the fund so raised in discharge of the debt. The ground of the equitable liability of the members is the credit which the company has gained as a corporation, on the promise of the individual members to raise a fund which should enable the corporation to fulfil its engagements. Where the liability of each member is expressly limited to the amount of his subscription, he may not be liable beyond it, without legislative enactment in the charter. In such case, a certain amount of capital is provided, to which all persons are supposed to give credit, and not to any engagement of the individual members. But where no such provision is made, but, on the contrary, the capital to which credit is given, consists of the liability of the members to the payment of such sums of money as the society from time to time may require, each member is personally liable in equity for his proportion of the debts of the corporation.¹ So, equity will compel stockholders to pay the creditors of the corporation, when the debt is established, in proportion to the amount of their unpaid subscriptions to the capital stock.² In such

¹ *Washington Beneficial Society v. Bacher*, 8 Harris, 429. In the case of the *Marion Beneficial Society v. Drake*, Chief Justice Lewis said, "The principle seems to be a just one, that the members of incorporated companies are bound to fulfil the obligations of the corporation itself, whenever their responsibility is not restricted by the charter, as it may be by express provision ascertaining the amount of capital stock or the measure of liability. The members are not directly responsible to the creditors of the corporation; but when they authorize it to contract debts for their benefit, they are each bound in conscience to contribute to the corporation itself, a just proportion of the fund necessary to meet the engagement thus made. And a court of equity will give effect to this obligation by compelling the corporate authorities to make the necessary assessment." 17 May 1855, MS. See *Salmon v. Hamburg Company*, 1 Chan. Cas. 206; 6 Viner's Abr. 310; *Slee v. Bloom*, 19 Johns. 484; *Hume v. Winyaw and Wando Canal Co.* 1 Carolina Law Journal, 217; 7 Am. Law Mag. 92.

² *Bank of Virginia v. Adams*, 1 Pars. 534.

cases, the decree is, first, that the company shall pay the plaintiff's debt; secondly, upon non-payment thereof, that the corporation officers make such assessment on the members as will be sufficient to pay the sum due; and lastly, that on failure to make such assessment, process shall issue, to make every member of the company contribute his quota to the payment of the plaintiff's debt.¹ Such a decree, however, cannot be made against a foreign corporation; to induce the court to interfere in causes of action arising in a foreign jurisdiction, it must be competent to administer the appropriate equity required by the case, and capable of giving effect to its decree.²

§ 197. On the dissolution of a corporation, a court of equity will entertain a bill for an account and to settle the equities between the different classes of the stockholders. This frequently gives rise to questions of great embarrassment. Such was the case of *Krebs v. The Directors of the Carlisle Bank*:³ it was there held, that where the stockholders in a bank, whose charter gave them a *right*, but did not *oblige* them to pay in full, the price of the stock subscribed, paid, some of them in full, and some but in part, and the bank went into liquidation from a loss sufficiently partial to allow such a rule; that the stockholders who had paid in full had a right to a return of the excess paid by them above the others, who had paid but in part, before any division of its balance took place. This balance was then to be divided, (after deducting the loss) rateably among the stockholders, and this, though the bank had been in operation for many years, making dividends of profits in proportion to the amounts paid in. The case was subsequently taken, by

¹ Ibid. 547-8.

² Ibid. 547; *Morris v. Remington*, Ibid. 387.

³ 2 Wall. Jr. 33.

appeal, to the supreme court of the United States, where the decree was affirmed by an equally divided court.

§ 198. The most common instances of the interference of courts of equity in reference to partnerships, are bills for an account, either upon a dissolution, or during the continuance of the partnership. It was at one time supposed that, in consequence of the rule that complete justice must be done with respect to the subject matter, the court could not, and would not, interfere at all between partners, unless the partnership was to be dissolved and finally wound up and settled; and there are several conflicting authorities in the books on the subject; different judges having entertained strong opinions and different views upon the question. But it is now settled, that a court of equity will entertain a bill for an account filed by one partner against his associate, where the bill does not contemplate a dissolution of the partnership. In cases of silent partnerships, where the active partner is rarely the capitalist, the evil workings of the contrary rule would be intolerable; as they would also specially be under our law of limited partnership, where the capitalist partner is excluded from active participation by positive law, and where he has little if any means of ascertaining the veritable condition of the concern, if unjustly denied him, except through the intervention of a court of equity. If such a partner could not obtain this aid except on the terms of dissolving the partnership, few prudent men would enter into such an engagement; where they are certain of hazarding their investment, and where their continuance in the business, if profitable, really must depend on the pleasure of the active associate, which would be the case if such were the doctrine in Pennsylvania.¹

¹ *Hudson v. Barrett*, 1 Pars. 414, 418, 420.

§ 199. It is the duty of all courts, and specially so of a court of equity, to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy. The principles of equity are broad and comprehensive: they sprang into existence as a separate system from the requisitions of a progressive civilization; to the necessities of which, the narrow technicalities of the common law afforded no adequate expansion. Though based, as every system of philosophical jurisprudence must necessarily be, on defined principles, still, in its application to the affairs of men, equity ever looks to great principles, rather than special modes of procedure, which latter must always give way when they come in conflict with the application of those principles to cases embraced within them.¹

§ 200. Where a dissolution has taken place, an account will not only be decreed, but if necessary, a receiver will be appointed to close up the partnership business, in order to a final distribution of the effects. The accounts are usually directed to be taken before a master, who examines the parties, if necessary, and requires the production of all books, papers, and vouchers of the partnership, and is armed by the court with all the powers necessary to effectuate the objects of the reference. If needful, the court will also restrain the partners, by injunction, from collecting the debts or disposing of the property, and will direct the moneys of the firm,

¹ Ibid. 421.

received by any of them, to be paid into court.¹ A court of equity will also decree the dissolution of a partnership during the term, either on account of the gross misconduct, or permanent incapacity, of one or more of the partners, or where it has become impracticable to carry on the undertaking, either at all, or according to the stipulations of the articles.²

§ 201. By the general law of partnership, a partner will, in many instances, be entitled to an injunction against his co-partner; as when the latter has become insolvent and is receiving the partnership debts;³ or when his conduct is overbearing and oppressive;⁴ or when he applies partnership property to uses not warranted by the agreement;⁵ or when there is an execution against the partnership property for a separate debt;⁶ or when a bill of exchange has been improperly accepted, to prevent its negotiation.⁷ And a court of equity will sometimes grant an injunction under circumstances which may not call for a dissolution.⁸ But in the case of mines, it would seem, that the court will in no case proceed by injunction to restrain the actual working of them. The consequences of such a step might be fatal to all parties, and the appointment of a manager will sufficiently remedy any cause of complaint which could arise to demand the interference by injunction.⁹

§ 202. Whatever may be the rights of a partner

¹ 1 Story's Eq. § 672.

² Ibid. § 673; 1 Pars. on Contr. 172-3; *Gowan v. Jeffries*, 2 Ash. 305.

³ *Williams v. Bingley*, 2 Vern. 278.

⁴ *Charlton v. Poulter*, 1 Ves. 429; 19 Ves. 148.

⁵ *Glassington v. Thwaites*, 1 S. & S. 124.

⁶ *Charlton v. Poulter*, 19 Ves. 148, n; *Goodman v. Whitcomb*, 1 J. & W. 592.

⁷ *Taylor v. Field*, 4 Ves. 396; *Bevan v. Lewis*, 1 Sim. 376.

⁸ *Hood v. Aston*, 1 Russ. 412.

⁹ *Bainbridge on Mines*, 310; see *Sheppard v. Oxenford*, 25 Law Times R. 90.

upon a dissolution, it is clear that he cannot transfer to a stranger his interest in the partnership, and thereby introduce him into the concern as a partner.¹ Nor can he, by a transfer, convey to a stranger those rights which he possesses only because he is a partner. The stranger thus coming into the concern is entitled to use the appropriate means to ascertain the situation of the partnership; he may demand an account, and perhaps an immediate settlement, but not being a partner, he has no right personally to interfere; and the refusal of the remaining partners to permit him to do so, is no sufficient reason for depriving them of any rights to which their position entitles them. The remaining partners, after a dissolution thus effected, are entitled to hold possession for the purpose of paying off the debts and winding up the assets of the firm.²

§ 203. Where the interest of one partner in the partnership property passes to another person, it is immaterial whether that transfer be effected by a sale by the partner himself for a valuable consideration; by a sale of his interest on execution; by his death and the succession of his executor or administrator; or by assignment under the bankrupt or the insolvent laws. In all these cases, the party coming in the right of the partner, comes into nothing more than an interest in the partnership which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner; and it is an item in the account, that enough must be left for the partnership debts.³ It is a rule well settled, that as between the partners themselves, the partnership creditors must be first paid out of

¹ *Mason v. Connell*, 1 Wh. 381; *Cochran v. Perry*, 8 W. & S. 262; *Horton's Appeal*, 1 Harris, 67; *Baker's Appeal*, 9 Harris, 76.

² *M'Glensey v. Cox*, 1 Am. L. R. 36.

³ *Baker's Appeal*, 9 Harris, 82.

the partnership property. This rule is constantly recognised in the distribution of assets, and is the vital element in the contract of partnership, which gives it confidence with the public.¹

§ 204. But in administering partnership funds, preference is given to joint creditors, not from any merit residing in them, or because, considered in reference to themselves alone, they are vested with rights superior to the separate creditors. The equity, from the operation of which they derive the incidental advantage, appertains to the partners, and arises from the nature of the contract of partnership. The equity springing from their community of interest, in the capital stock and effects of the partnership, is to have the avails of these applied in discharge of their mutual liabilities, before any individual of their number is permitted to apply the joint property to his private uses. As between themselves each is said to have a specific lien on the present and future property of the association, as well to secure payment of debts due to third persons, as for his own share of the joint effects. It is by the working of this equity, the partnership creditors are first let in on the partnership funds, and only because it is necessary to the administration of justice between the partners.²

§ 205. The creditors of the firm have no lien on the property, and must work out their preference in the distribution of the partnership funds, entirely through the medium of the partners whose interests remain undisposed of. If they consent or submit to a different disposition of the assets, the preference of the creditors is at an end, and they must rely upon the personal responsibility of

¹ *Deal v. Bogue*, 8 Harris, 234.

² *Snodgrass's Appeal*, 1 Harris, 474; *Bell v. Newman*, 5 S. & R. 85.

the partners who contracted the debts. Where one partner sells his interest to another, in consideration of an engagement by the latter to pay the partnership debts, the rule is the same. The engagement to pay them is but a personal contract; it creates no lien on the property. It follows as a necessary consequence, that if the partner who has acquired the interests of his former associates, and in whom resides the right to appropriate the partnership assets to the payment of partnership liabilities, think proper to exercise his dominion, and to make a different disposition of them, he has a right to do so; and the preference of the partnership creditors engrafted upon, and deriving its support from his equity, ceases to exist.¹

§ 206. How far land conveyed to partners, as tenants in common, shall be considered as partnership property, and whether it changes its nature and becomes personal estate, has been the subject of much discussion.² Land, except for the purpose of erecting necessary buildings, is not naturally an object of trade or commerce. Yet there is no doubt, that by the agreement of the partners, it may be brought into the stock, and considered as personal property, so far as concerns themselves and their heirs and personal representatives.³ It would be absurd to let the nature of the article dealt in change the nature of the contract; or not to let partners give to land the attributes of a commodity, as between themselves and those standing in their place, especially in a country where it is a chattel for the payment of debts, and not unfrequently a subject of speculation. Where it is

¹ Baker's Appeal, 9 Harris, 82-3; Wharton v. Grant, 5 Barr, 39; and see Kelly's Appeal, 4 Harris, 59.

² See 1 Pars. on Cont. 125.

³ M'Dermot v. Laurence, 7 S. & R. 440-1; Ripley v. Waterworth, 7 Ves. Jr. 424.

brought into a concern as stock, it is, as between the partners and a person who has knowingly dealt with one of them for it, to be treated as personal estate belonging, not to the partners individually, but to the company collectively. The members of such a company, being sharers of profit and loss, are partners to the world; but, between themselves, they have only a contingent interest in the profits to be derived from the lands when the concern shall be wound up, not a vested estate as tenants in common of the lands themselves; and to a purchaser with notice, or its equivalent, neither of them can part with more, either by a voluntary or an involuntary conveyance.¹

§ 207. It is a consequence of the principle of land being affected with a trust as partnership property, that when one partner disposes of his separate interest in land held as partnership stock, he sells only his residuary interest, after the partnership debts and the share of the other partner are paid. But though in equity land is thus affected with trusts in the nature of personal estate, the land does not become personal property in such a way as to give one partner an implied power to dispose of the whole partnership interest in it; as regards the power of disposition, land held as partnership-stock is not subject to the rule which makes each partner the agent of the firm. Neither can sell more than his own undivided interest, unless he have from the other a sufficient special authority for that purpose.²

¹ *Kramer v. Arthurs*, 7 Barr, 171-2. Where real estate is brought into the partnership business, it is treated, in equity, as personal estate; and a lease of it by one partner, in his own name, will enure to the benefit of the firm. *Moderwell v. Mullison*, 9 Harris, 259; and see 1 Am. Lead. Cas. 495.

² 1 Am. Lead. Cas. 506-7; *Anderson v. Tompkins*, 1 Brock. 457, 463; *Tapley v. Butterfield*, 1 Metc. 515-18.

§ 208. But if a conveyance of land be taken to partners, as tenants in common, without mention of any agreement to consider it as stock, and afterwards a stranger purchase from one of the partners, it would be unjust if, without notice, he should be affected by any private agreement.¹ And accordingly, it has been determined, that where partners intend to bring real estate into the partnership stock, that intention must be manifested by deed or writing, placed on record, that purchasers and creditors may not be deceived;² or the conveyance must be made to them as partners, and not as tenants in common.³ To affect the title or possession of land, it is not competent to show by parol that real estate, conveyed to two persons as tenants in common, was purchased and paid for by them as partners, and was partnership property. In all such cases parol testimony is totally disregarded.⁴

§ 209. An unincorporated association for purposes of private and individual profit or pleasure, with no public object, is treated as an ordinary partnership; and so, where an association is for private emolument, or for benevolence, confined exclusively to the associates, and in which none others participate, as between themselves, they are partners.⁵ But a private unincorporated association, for general purposes of public utility, as a fire engine or hose company, a court of equity will not treat as a partnership, nor declare its dissolution and divide its assets among the members. Property given to such an association is pledged to the objects for which it was in-

¹ *M'Dermot v Laurence*, 7 S. & R. 441.

² *Hale v. Henrie*, 2 Watts, 146-7; *Ridgway's Appeal*, 3 Harris, 181.

³ *Lancaster Bank v. Myley*, 1 Harris, 550.

⁴ *Ridgway's Appeal*, 3 Harris, 181.

⁵ *Thomas v. Ellmaker*, 1 Pars. 98; *Kramer v. Arthurs*, 7 Barr, 171.

tended to be applied by the successive contributors, and cannot be diverted from them, while those who remain are ready and willing to execute the public trust with which it has been clothed. In such private associations, the majority cannot bind the minority, unless by special agreement: nor will a court of equity suffer its funds to be diverted to other uses than the donors intended. And it seems, that if an individual be unjustly, and without reasonable cause, deprived of his membership in such an association, a court of equity may grant relief by reinstating him in his membership, and sustaining him in the enjoyment of the functions of which he had been deprived by the unjust acts of his associates.¹

§ 210. Upon the dissolution of a partnership by death, it becomes the duty of the surviving partners, with all practicable diligence, to wind up and settle the partnership concerns, to pay the partnership debts, and to distribute the surplus among those who are entitled to it, according to their respective shares therein; and in case of delay, or danger of loss, or neglect of duty, to require the aid of a court of equity to enforce the duty, and to compel a full account and settlement of the whole concern. Hence, the personal representatives of the deceased partner have a right to insist upon the application of the joint property, in the hands of the survivors, to the payment of the joint debts, and a division of the surplus.² If the surviving partner neglect or refuse to proceed, within a reasonable time, to close up the business of the firm and settle its concerns, a court of chan-

¹ *Thomas v. Ellmaker*, 1 Pars. 98, 114; and see *Blisset v. Daniel*, 23 Eng. L. & Eq. 105. But equity has no jurisdiction with regard to the election or amotion of corporators, nor in case of a public officer *de facto* of a municipal character. *Hagner v. Heyberger*, 7 W. & S. 104.

² *Holden's Administrators v. M'Makin*, 1 Pars. 279.

cery will take the property out of his custody, and commit it to the care of a receiver, and direct him to make sale of the same; and in ordering a sale of partnership property, a court will direct all the property to be sold, not only that which is of a tangible, but even of a speculative value, such as leasehold property, the subscription list of a newspaper, and the good will of the partnership.¹

§ 211. It frequently happens that the same individual is a member of two or more distinct firms, composed of different persons, one of which is debtor to another. At common law, no suit could be brought for the recovery of such a debt, because under no state of circumstances could the same person be plaintiff and defendant in the same cause: the sole remedy in such cases was in a court of equity. By statute, an action at law may be maintained in this state between two firms composed partly of the same individuals;² but this act is restricted to cases in which the same individual is a member of two distinct co-partnerships; it does not authorize one partner to bring an action against himself and his co-partners;³ in such case a party must still proceed by bill in equity. And even where judgment is obtained in such an action, the remedy is an imperfect one; for although such judgment is a lien on the separate real estate of the partners, yet their separate estate cannot be seized in execution until the accounts are taken, and the equities settled between the parties.⁴ The defendant, whose estate is thus bound, will be driven to his action of account render, or to his bill in equity, to free himself of the incumbrance.⁵

¹ Ibid. 270.

² Purd. Dig. 633.

³ *Miller v. Knauff*, 3 Penn. L. J. 225; *M'Fadden v. Hunt*, 5 W. & S. 472.

⁴ *Meconkey v. Rogers*, Bright. R. 450.

⁵ Ibid. 460.

CHAPTER XI.

SPECIFIC PERFORMANCE.

§ 212. WE will now pass to the consideration of another branch of equitable jurisdiction, namely, the cases in which a court of equity will decree a specific performance of an agreement. In a court of law, when a contract has been broken, the remedy is to recover damages for its non-performance; in equity, the courts will decree a specific performance. Our statutes have granted to the courts, before enumerated,¹ “the powers and jurisdiction of courts of chancery, so far as relates to the affording specific relief, when a recovery in damages would be an inadequate remedy.”² The rule for granting relief in equity is, that where a party is entitled to the thing in specie, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance.³ But this remedy extends only to contracts of which a specific performance is essential to justice; for, if damages for non-performance be all that justice requires, as in the case of contracts for stock in the public funds, or the sale of goods, a court of equity will not interfere.⁴

§ 213. As a general rule, equity will not entertain

¹ Ante, § 35. The jurisdiction of the supreme court, in such cases, extends throughout the state. *Purd. Dig.* 308, pl. 25.

² *Purd. Dig.* 305-6.

³ 1 *Fonbl. Eq.*, b. I. ch. i. § 5, note c.

⁴ 4 *Bouv. Inst.* 193.

jurisdiction for the specific execution of agreements respecting things merely personal in their nature; yet this rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. But where there exists an utter uncertainty in any calculation of the damages arising from the breach of a contract personal in its nature, where the measure of damages is purely conjectural, equity will intervene; because, though there may exist a remedy at law, yet that remedy is inadequate and inefficient.¹ Of this *Buxton v. Lister*,² furnishes an example. It was a bill to enforce the performance of an agreement for the purchase of several large parcels of growing wood, to be severed by the defendants, who were to have eight years to dispose of it, and to pay for it in six yearly instalments. Lord Hardwicke was at first extremely reluctant to entertain the bill, but after discussion came to the conclusion, that though relating to a personal chattel, it was such an agreement that the plaintiff might come into chancery for a specific performance.³

§ 214. The courts will enforce a similar equity in the analogous case of a bill for the delivery of a specific chattel. Thus, where a defendant had in his custody and possession a number of valuable plans, drafts, and maps belonging to the plaintiff, which he refused to deliver to the owner, the court decreed the specific return. In such case chancery interferes, not only because there is no standard by which the measure of damages can be ascertained at law, but also because, generally, the defendant is a depositary on an express trust for the re-delivery of

¹ *Palmer v. Graham*, 1 Pars. 479; see 1 Pars. on Contr. 412-13.

² 3 Atk. 384.

³ *M'Gowin v. Remington*, 2 Jones, 61; *Pooley v. Budd*, 7 Eng. L. & Eq. 234.

the goods claimed which, upon a common ground of equity, gives the plaintiff a title to relief.¹ So, a court of equity will compel the delivery of the title deeds of an estate to a party who has recovered possession of the land at law.²

§ 215. Where the contract relates not alone to the sale or enjoyment of personal chattels, but principally to personal acts, courts of equity will sometimes interfere and compel the specific performance of such agreements, upon the ground that no adequate remedy can be had at law.³ Thus, if a vendor sell his place of business and the good will of his trade, and in his contract of sale, stipulate not to carry on his trade within certain defined limits; a court of equity will enforce the specific execution of such a contract, and, at the suit of the vendee, will, by injunction, restrain the vendor from carrying on his trade within the place specified in the agreement. So, where a partner sells his interest in the good-will of a trade or business, and, on receiving a compensation therefor, agrees not to commence a similar trade or business in the same vicinity, a court of equity will restrain him, by injunction, from prosecuting the same. In such cases, equity entertains jurisdiction by compelling a specific performance, on the ground of the inadequacy of an action at law to give the party aggrieved a full and perfect remedy for such a breach of good faith.⁴ Another exception to the rule that equity does not decree specific performance of a contract relating exclusively to a per-

¹ *M'Gowin v. Remington*, 2 Jones, 56, 63.

² *Mange v. Guenat*, 6 Wh. 141.

³ The jurisdiction of the court of chancery in such cases is very ancient. "A subpoena lieth on a promise or agreement by word of mouth, as to build a house, or to do any other lawful act; 8 Ed. iv. 4." 2 West's Symb. 178.

⁴ *Palmer v. Graham*, 1 Pars. 476; *Hawk v. Greensweig*, 2 Barr, 298.

sonal chattel, is that of an agreement which is to be perfected by the execution of an instrument.¹

§ 216. A bill for the specific execution of a contract, is not entertained in equity as a matter of right, but it is addressed to the discretion of the court; not, indeed, to its arbitrary and capricious discretion, dependent upon the mere pleasure of the judge, but to that sound and reasonable discretion which governs itself, as far as it may, by general rules and principles; but, at the same time, which grants or withholds relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties.² It is a cardinal principle, that a chancellor, when uncontrolled by arbitrary enactment, executes no contract which is not the source of mutual obligation and mutual remedy.³ To entitle a party to a decree for specific performance, the contract must be mutual. Both parties must, by the agreement, have a right to compel specific performance; otherwise it would follow, that the court would decree a specific performance where the party called upon to perform it might be in this situation, that, if the agreement were disadvantageous to him, he would be liable to the performance, and yet, if advantageous to him, he could not compel a performance by the other party.⁴

§ 217. Thus, a court of equity has jurisdiction to compel a vendee to complete his contract for the purchase of lands, as well as it has to compel a vendor to complete his contract for the sale of such lands; for it has been

¹ *Insurance Co. of N. America v. Union Canal Co.*, Bright. R. 48.

² *Pennock v. Freeman*, 1 Watts, 408; *Dalzell v. Crawford*, 1 Pars. 37; *Farley v. Stokes*, Ibid. 429; *Vint v. King*, 2 Am. L. R. 743; *Greenlee v. Greenlee*, 10 Harris, 235.

³ *Wilson v. Clarke*, 1 W. & S. 555.

⁴ *Bodine v. Glading*, 9 Harris, 53.

settled by repeated decisions, that the remedy in equity must be mutual, and that where a bill will lie by the purchaser it will also lie for the vendor. Another ground for the exercise of the jurisdiction in such cases is, that a recovery in damages is not regarded in equity as an adequate remedy for a breach of contract for the sale of land. Nothing is better settled, than that a recovery in damages is regarded as an inadequate remedy in cases where they are estimable only by conjecture, and not by any accurate standard. This consideration, enforced by the morality of the requisition that men shall perform their contracts, if they can, and by the immorality of sanctioning their violation of them on the payment of damages, is one of the very grounds on which equity decrees specific performance; and it is a sufficient one. This reason applies to the duty of both vendor and vendee; for damages for a breach of contract for the sale of land, can have no standard, except that which arises from a comparison between the real value of the land sold and the contract price; and experience teaches how very uncertain must be this only standard on which a recovery in damages can be based.¹

§ 218. Another rule constantly enforced by courts of equity is, that where the applicant for specific perfor-

¹ *Finley v. Aiken*, 3 Pittsburgh Leg. J. 1; *Dalzell v. Crawford*, 1 Pars. 42-3; *Twells v. Costen*, *Ibid.* 381-2; *Farley v. Stokes*, *Ibid.* 431. Mr. Justice Black dissented from the reasoning of the majority of the court in *Finley v. Aiken*, and contended that a vendor, in such case, has a complete remedy at law, as administered under our system; he said, "If equity, in Pennsylvania, means the power of doing justice, where Pennsylvania law fails, as it means, in England, the power of doing justice where English law fails; and if Pennsylvania law does not fail in this case, then it follows most clearly that it cannot, constitutionally, be tried without a jury." In these views, Mr. Justice Knox fully concurred, and Mr. Justice Woodward said he would also have done so, if it were now to be decided as a new question, but considered himself constrained by former precedents to the contrary. 3 Pittsburgh Leg. J. 2-4.

mance has omitted to perform his own part of the agreement, without being able to assign a justification or excuse for it; and where there is nothing in the acts or conduct of the other party which amounts to an acquiescence in the delay, the court will not interfere.¹ Every bill for a specific performance should state, either that the plaintiff has performed the agreement on his part, or that he is willing and prepared to perform it.² Where no time is fixed in the contract for its final completion, it ought to be perfected in such time, as the court, having regard to all the circumstances existing in a given case, will regard as just and reasonable; a court of equity will not exercise its power for the specific performance of a contract where a party has slept on his rights; diligence is necessary to call the court into action; and where it does not exist, equity will not lend its assistance.³ Nor can a party have the aid of a chancellor in executing a contract, when by his own laches, the rights of third persons, without notice, have intervened, which will be prejudiced by the action asked for.⁴

§ 219. In general, time is not of the essence of a contract, in a court of equity. But time, unquestionably, is regarded in equity as of the essence of the contract, where from the nature of the estate, the uses to which it was intended to be applied by the purchaser, or from anything else, it is shown to have been so regarded in framing the contract.⁵ Time may become of the essence of the contract, either by the express stipulation of the

¹ *Fisher v. Worrall*, 5 W. & S. 485; *Benedict v. Lynch*, 1 Johns. Ch. 374; *Peebles v. Reading*, 8 S. & R. 497; *Greenlee v. Greenlee*, 10 Harris, 235.

² *Chess's Appeal*, 4 Barr, 52.

³ *Parrish v. Koons*, 1 Pars. 79.

⁴ *Insurance Co. of N. America v. Union Canal Co.*, Bright. R. 48.

⁵ *Dalzell v. Crawford*, 1 Pars. 56; *McCrelish v. Churchman*, 4 Rawle, 37-8.

parties,¹ or, by implication, arising from the very nature of the property, or the avowed objects of the purchaser or seller; and even where time is not thus, either expressly or impliedly, of the essence of the contract, if a party seeking a specific execution have been guilty of gross laches, or have been inexcusably negligent in performing the contract on his part, or if, in the intermediate period, there have been a material change of circumstances, affecting the rights, interests, and obligations of the parties, equity will refuse to decree a specific performance, on the ground that it would be inequitable and unjust. But, except under these or analogous circumstances, time is not treated as of the essence of the contract, and relief will be decreed to the party who seeks it, if he have not been grossly negligent, and come within reasonable time, although he have not complied with the strict terms of the contract.² A plaintiff, however, calling for performance, after a great lapse of time, must satisfy the court, that he did not lie by to take advantage of fortuitous circumstances; that during the whole period, he had it in contemplation to perform the contract, and that the other party expected to be called on.³

§ 220. As the specific performance of a contract in equity is of grace and not of right; if there be anything inequitable in it, the court will withhold its assistance, and leave the parties to their legal remedies, on the agreement; such is the course in respect of a purchase from a party intoxicated, though not by the procurement

¹ *Vint v. King*, 2 Am. L. R. 745; *Garnett v. Macon*, 2 Brock. 186.

² *Tiernan v. Roland*, 3 Harris, 438; *Taylor v. Longstrath*, 14 Peters, 174; and see *Bodine v. Glading*, 9 Harris, 54.

³ *Tiernan v. Roland*, 3 Harris, 438; *Alny v. Deschamps*, 12 Ves. 225; *Peebles v. Reading*, 8 S. & R. 493.

of the purchaser; yet such a purchase is unimpeachable at law.¹ So, a misrepresentation by the vendor of an occult quality in land, although it may be made in ignorance of the truth, and although the vendee agree to run the risk of it, is, in a suit for specific performance of the contract, a decisive objection to the plaintiff's recovery.² And although the subject and import of the written contract be clear, so that there is no necessity to resort to evidence for its construction, yet, if the defendant can show any circumstances, *dehors*, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a court of equity, having satisfactory information on the subject, will not interfere.³ A court of equity will never exert this extraordinary branch of its jurisdiction, in a case where the party, who asks its assistance, is chargeable with unfair conduct in relation to the contract which he seeks to enforce, but will turn him away from that forum, and leave him to his legal remedy.⁴ If, in such a case, the court should doubt, it will withhold its aid; for it requires much less strength of case on the part of the defendant to resist a bill to enforce a contract, than it does on the part of the plaintiff to maintain a bill to enforce a specific performance.⁵

§ 221. A vendor cannot have the assistance of a court of equity for the specific performance of a contract, which he has induced the vendee to make by any kind of mis-

¹ *Pennock v. Freeman*, 1 Watts, 408-9; but see *Shaw v. Thackray*, 23 Eng. L. & Eq. 18.

² *Fisher v. Worrall*, 5 W. & S. 478.

³ *Dalzell v. Crawford*, 1 Pars. 45.

⁴ *Thompson v. Tod*, 1 P. C. C. 385; *Greenlee v. Greenlee*, 10 Harris, 235; *Davidson v. Little*, *Ibid.* 251.

⁵ *Farley v. Stokes*, 1 Pars. 429; *Hawk v. Greensweig*, 2 Barr, 298; *Brawdy v. Brawdy*, 7 Barr, 158.

representation concerning the subject matter. All the authorities at home and abroad, with one voice declare, that he who seeks equity must do equity; that he must come with clean hands, with perfect propriety of conduct, and with a contract just and fair in all its parts. The conduct of the plaintiff must be liable to no imputation whatever. He cannot demand this extraordinary aid, if he have been guilty of misrepresentation in a degree which operates only to a small extent in causing the contract. Even suspicious circumstances have been held a sufficient ground for refusing a decree. A contract, to have the assistance of a chancellor, must have an immaculate source. The bargain should be performed fully, fairly, and honestly, on both sides, or on neither.¹ The undoubted rule, universally acknowledged, always laid down, and never departed from, is, that a false statement of the vendor concerning the subject matter of the contract, whether made innocently or fraudulently, will totally disable him from getting a decree for specific performance.²

§ 222. It has been a subject of much discussion, whether a specific performance ought to be decreed, where a husband covenants that his wife shall execute a conveyance to bar her right of dower in his estate; and there are many cases, in which covenants of this sort have been decreed to be specifically performed.³ But it seems to be at last settled, on principles of policy and humanity, that equity stirs not to enforce a contract which involves in it a wife's volition in regard to her property; and it seems strange to us now, that courts

¹ *Finley v. Aiken*, per Black, J., 3 Pittsburgh Leg. J. 3; *Campbell v. Spencer*, 2 Binn. 129; *Patterson v. Martz*, 8 Watts, 379.

² *Finley v. Aiken*, *ut supra*; 1 Pars. on Contr. 414.

³ 2 Story's Eq. § 731.

of chancery should ever have hesitated about it. Contrary to the benign spirit of the common law, the avowed purpose of process of contempt against the husband, is to extort a conveyance from her affection or her fear. It would be a mockery to tell her she is free to act at her pleasure, while the machinery of a court is put in motion to constrain her by the strongest sympathies of her nature. The disposition evinced by chancellors, in other cases, to set married women free from restraints imposed for their protection, and to hold them to the consequences of their acts performed notoriously under the influence or coercion of their husbands, is one of those things, in respect to which the superior wisdom and fitness of the common law is vindicated by experience. "I would not," said Chief Justice Gibson, "were it practicable to avoid it, expose the husband to imprisonment for a breach of the contract, even by an action; fear of which, doubtless, serves to loosen the wife's hold on the property; but it is clear the contract will not be decreed on terms that would jeopard his liberty."¹ A party who covenants to procure such a joinder, is doubtless liable at law for a failure, in damages proportioned to the loss; but not stipulated damages, in the shape of the whole purchase money, which may be exorbitant.²

§ 223. Before proceeding to the consideration of the numerous class of cases in which courts of equity will decree a specific performance of a contract respecting lands; it will be proper to observe, that equity will entertain a bill to enforce a contract respecting land, although it be situate out of the jurisdiction of the court, if the parties be resident within its territorial jurisdic-

¹ *Clarks v. Seirer*, 7 Watts, 110; *Riddlesberger v. Mentzer*, Ibid. 142; *Shurtz v. Thomas*, 8 Barr, 363.

² *Fisher v. Worrall*, 5 W. & S. 486.

tion; for although they cannot bind the land itself by their decree, yet as courts of equity act upon the person, they can bind the conscience of the party in regard to the land, and compel him to perform his agreement according to conscience and good faith.¹ The jurisdiction of a court of chancery is sustainable in cases of fraud, trust, or contract, wherever the person be found, although lands not within the jurisdiction of the court may be affected by the decree;² and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest the jurisdiction. In a cause, however, involving a naked question of title, the jurisdiction cannot be sustained.³ To justify the court in exercising a jurisdiction in cases touching lands in foreign countries, the relief sought must be of such a nature as the court is capable of administering in the given case; therefore, they cannot restrain a nuisance affecting lands out of their territorial jurisdiction.⁴

§ 224. Contracts respecting lands may be divided into two great classes; namely, parol contracts within the statute of frauds, and written contracts not falling within the statute. That statute, as re-enacted in Pennsylvania in 1772, declares, "that all leases, estates, interest of freehold or term of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents

¹ 2 Story's Eq. § 743.

² *Morris v. Remington*, 1 Pars. 392; *Massie v. Watts*, 6 Cranch, 148.

³ *Morris v. Remington*, 1 Pars. 393; *Massie v. Watts*, 6 Cranch, 158.

⁴ *Morris v. Remington*, 1 Pars. 387.

thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making such parol leases or estates, or any former law or usage, to the contrary notwithstanding; except, nevertheless, all leases not exceeding the term of three years from the making thereof. And moreover, no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time be assigned, granted, or surrendered, unless it be by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereto lawfully authorized by writing, or by act and operation of law."¹

§ 225. This statute presents a positive bar, both in law and equity, to the enforcement of a parol unexecuted contract for the sale of lands.² It therefore becomes necessary to consider the exceptions which have been engrafted on it by the decisions of courts of chancery. For it is well settled, that a statute made to suppress frauds and perjuries shall not be so construed as itself to become an instrument of fraud.³ The infirmities of memory, the death of witnesses, the corruptibility of witnesses, the honest mistakes of witnesses, and the misunderstanding of parties, these are all elements of confusion and discord which ought to be excluded from titles to the most coveted, if not most valuable of terrestrial objects. And it is the purpose of the statute of frauds and perjuries to exclude these elements, and to compel men to create

¹ Purd. Dig. 627-8.

² *Irvine v. Bull*, 4 Watts, 289.

³ *Moore v. Small*, 7 Harris, 466.

testimonials of their intentions which are certain and enduring.¹

§ 226. The first exception to the statute that will be considered is, where the parol contract is fully set forth in the bill, and is confessed in the defendant's answer;² in such case, a court of equity will enforce the specific execution of the contract, for it is obvious that the case is taken entirely out of the mischief intended to be guarded against by the statute. But the contract admitted in the answer, must not essentially vary from that set forth in the bill; unless they correspond, the plaintiff must establish his case by *legal proofs*, showing himself entitled to the relief prayed for.³ And if the defendant, in his answer, even admit a parol contract, as charged in the plaintiff's bill, still he may rely on the statute as a complete bar. It is immaterial what admissions are made by a defendant, who insists upon the benefit of the statute, for he throws it upon the plaintiff to show a complete written agreement; and it can be no more thrown upon the defendant to supply the defects in the agreement than to supply the want of an agreement.⁴

§ 227. In the next place, a court of equity will enforce the specific execution of a contract within the statute, where such contract has been so far, in part, executed, as to render it unjust to rescind the same.⁵ This

¹ Moore v. Small, 7 Harris, 465.

² Parrish v. Koons, 1 Pars. 97; Christy v. Brien, 2 Harris, 249.

³ Parrish v. Koons, 1 Pars. 97; Thompson v. Tod, 1 P. C. C. 384; Gangwere's Estate, 2 Harris, 426.

⁴ Parrish v. Koons, 1 Pars. 97. Thompson v. Tod, 1 P. C. C. 388; Thompson v. Jamesson, 1 Cr. C. C. 295.

⁵ This rule is indicated by the act of 10th March 1818, providing for the proof and specific execution of the parol contracts of decedents; Purd. Dig. 160. And see Greenlee v. Greenlee, 10 Harris, 235.

excludes the possibility of the statute becoming an instrument or occasion of fraud, for if in any case it be not unjust to rescind a parol contract, it cannot be fraud to rescind it. The legislature seem to have considered all parol contracts as within the statute of frauds and perjuries; and that, though partly executed, they ought to be rescinded, if it can be done without injustice to the parties; but if they have been so far executed as to render it unjust to rescind them, then the courts shall hold them to be without the statute, and go on and execute them fully. And every parol contract is held to be within the statute, except where there has been such part performance as cannot be compensated in damages.¹

§ 228. This rule may be considered as well established: what is such part performance, as will take the case out of the statute, is a question of much more difficulty. It seems formerly to have been thought, that a deposit, or security, or payment of the purchase money, or at least of a considerable part of it, was such a part performance as took the case out of the statute of frauds and perjuries. But that doctrine was open to much controversy, and has been finally overthrown. The distinction taken in some of the cases, between the payment of a small part and a payment of a considerable part of the purchase money, seems quite too refined and subtle. For, independently of the difficulty of saying what shall be deemed a small, and what a considerable part of the purchase money, each, upon principle, must stand on the same reason, that it is a part performance in both cases, or not in either. Nothing is to be considered a part performance which does not put the party into a situation, which is a fraud upon him, unless the agreement be per-

¹ Moore v. Small, 7 Harris, 466-7.

formed. As, therefore, payment of part or the whole of the purchase money, admits of full and direct compensation, there is no reason on that ground to take the case out of the act. And although a party may become insolvent before a judgment at law can be executed, yet it is better to submit to that inconvenience than to relax the requirements of the statute.¹

§ 229. The delivery of possession, in pursuance of a parol contract for an interest in lands, has uniformly been considered such a part performance as to take the case out of the statute;² for, unless the contract be held valid, the defendant would be liable to be treated as a trespasser. And it is not easy to see how a vendee, who has taken possession on the faith of the vendor, is not as much defrauded, by being turned out in winter, or subjected to mesne profits and the costs of an ejectment in case of resistance, as he who delivered it would be by a rescission of the contract; and it is still more difficult to see, upon the all-pervading principle of mutuality which governs a chancellor wherever he is left at liberty to act on principles of general equity, why the contract would be executed in behalf of the one party, if it would not be executed in behalf of the other.³ Without possession taken and maintained under the contract there can be no pretence of part performance; and where that is an act which can be compensated in damages, it is said that even possession is not sufficient.⁴ Be that as it may,

¹ *M'Kee v. Phillips*, 9 Watts, 86; *Parker v. Wells*, 6 Wh. 161; *Cangwer v. Fry*, 5 Harris, 495; 2 Story's Eq. § 760; see *Malins v. Brown*, 4 Comst. 403.

² *Jones v. Peterman*, 3 S. & R. 547; *Farley v. Stokes*, 1 Pars. 429.

³ *Pugh v. Good*, 3 W. & S. 62; *Reed v. Reed*, 2 Jones, 121. Mutuality is of the essence of all contracts, and indispensable to move the conscience of a chancellor. *Greenlee v. Greenlee*, 10 Harris, 235.

⁴ *Moore v. Small*, 7 Harris, 467.

however, if the purchaser have taken possession, and have made such improvements as to render it inequitable to deprive him of the land, his case would be taken out of the statute. But mere temporary erections, or repeated acts of ownership, such as erecting a temporary cabin for making sugar, or cutting timber, although repeated, do not constitute such a possession as will take the case out of the act.¹

§ 230. Unquestionably, the mere possession by the vendee, of the land which is the subject of the contract, will not be sufficient to take the case out of the statute, unless such possession be taken under and in pursuance of the contract. It is consequently a settled rule, that a parol sale to a tenant in possession, is within the statute, though his possession be afterwards continued, because there is no change of possession in execution of the contract.² Possession had before the agreement, and continued after it, is of too doubtful a nature to be considered as proof of part performance. A lessee, who continues in possession after the expiration of his lease, may be supposed to retain the possession by permission of the landlord, on the terms of the old lease; it would not be sufficient evidence of part performance of an agreement to purchase the land, or of a new lease for more than a year. The acts done in part performance must be such as could be done with no other view, than in performance of the agreement.³ So, the possession of the vendee will

¹ *Gangwer v. Fry*, 5 Harris, 495; *Haslet v. Haslet*, 6 Watts, 466; *Hugus v. Walker*, 2 Jones, 174.

² *Christy v. Barnhart*, 2 Harris, 262; *Galbreath v. Galbreath*, 5 Watts, 146; *Brawdy v. Brawdy*, 7 Barr, 157; *Greenlee v. Greenlee*, 10 Harris, 237.

³ *Jones v. Peterman*, 3 S. & R. 546; *Frye v. Shepler*, 7 Barr, 93; *Farley v. Stokes*, 1 Pars. 428. The case of *Lee v. Lee*, 9 Barr, 169, was decided on its peculiar circumstances, and was not intended to draw in question the principle laid down in the text; 2 Harris, 262.

not be sufficient to take the case out of the statute, unless it be exclusive of that of the vendor.¹ And such possession must be public and notorious;² and must not only be delivered and taken, but must be maintained in pursuance of the parol contract. Hence, if a purchaser by parol take possession under his contract, and afterwards attorn to the vendor as landlord, or fix upon himself any other character than that with which he entered, he lets go his equities, and his possession is referred to his new agreement.³

§ 231. To take a case out of the statute of frauds, the parol contract of sale must not only be established by competent proof, but it should be clear, definite and unequivocal. If the conditions and terms be uncertain, or not made out by satisfactory proof, a specific performance will not be decreed.⁴ It is the duty of the party, who invokes the aid of this peculiar equity, to establish, by clear, precise, and satisfactory proof, every requisite to take the particular transaction from without the operation of the statute.⁵ The boundaries of the land contracted for ought to be so fixed and certain, by the terms of the agreement, that the land could be set off, as the parties intended it to be, by a surveyor, in the event of a decree for a specific performance.⁶ But to show this, with reasonable certainty, is sufficient; it is not necessary that lines of separation be actually run upon the ground, if, from the agreement of the parties, and the distinct sub-

¹ *Frye v. Shepler*, 7 Barr, 93; *Blakeslee v. Blakeslee*, 10 Harris, 243; *Greenlee v. Greenlee*, *Ibid.* 237.

² *Brawdy v. Brawdy*, 7 Barr, 160.

³ *Rankin v. Simpson*, 7 Harris, 476.

⁴ *Charnley v. Hansbury*, 1 Harris, 21; *Greenlee v. Greenlee*, 10 Harris, 235; *Fricke v. Ozias*, 8 Leg. Int. 54; *Jones v. Pennel*, 12 Leg. Int. 42.

⁵ *Burns v. Sutherland*, 7 Barr, 106.

⁶ *Frye v. Shepler*, 7 Barr, 94.

sequent possession of the vendee, it be possible to ascertain the boundaries and quantity of the land sold.¹

§ 232. The statute of frauds and perjuries established a wise and safe rule, in relation to the purchase and sale of real estate; and every departure from it, when contemplated through the medium of time, only impresses on the mind the excellence of its provisions. If judges, who allowed themselves originally to be seduced from it, by the hardship of particular cases, had never swerved, the statute itself, and the necessity of adhering to its provisions, would have become so well known, that many of those distressing cases, arising from parol contracts, never would have occurred; and at all times, as well now as soon after its enactment, there would have been less hardship and injustice if its provisions had been strictly followed.² Hard cases make bad precedents, is a maxim which has been strikingly illustrated by the course of decision under this statute. Judges have been borne away, by sympathy for parties, from the letter of the law, and in their benevolent efforts to accommodate it to the changeful circumstances of cases, copious fountains of litigation have become unsealed. Nobody has lamented this more than the judges themselves. For the last twenty years there has scarcely been a judge of any considerable reputation, either in England or the United States, who has not, in some manner, put on record his regrets, the result of large experience, that the statute had been so widely departed from, and his conviction, that more evils have resulted from such departures than they have remedied.³

§ 233. These considerations have led the courts to de-

¹ Burns v. Sutherland, 7 Barr, 108.

² Frye v. Shepler, 7 Barr, 93.

³ Moore v. Small, 7 Harris, 466.

clare, that they would not extend the doctrine of part performance to cases which do not come clearly within the equitable principle of previous decisions. Chancellor Kent agrees "with those wise and learned judges, who have declared that the courts ought to make a stand against any further encroachment on the statute, and ought not to go one step beyond the rules and precedents already established."¹ And in Pennsylvania, where an action may be maintained to recover damages for the breach of a parol contract to convey lands, there is less reason, than elsewhere exists, for giving to such acts the effect of vesting in the purchaser a title to the land, against the positive provisions of a most wise and salutary enactment.²

§ 234. We have seen, that a parol contract will not be decreed to be specifically executed, even where there has been part performance, unless its terms be clearly and definitely ascertained. The same rule applies to written agreements. Thus, a receipt for part of the purchase money, defining the land sold but not fixing the price or other terms of sale, will not entitle the vendee to a decree for a specific performance. Such receipt is written evidence of some kind of an agreement about the land, and that it has been partly performed; but it does not inform us of the terms of the agreement, and without this it is impossible to enforce it. A contract is as much void when the consideration, as when the subject, is undefined. Where the parties have left either uncertain, the contract is legally incomplete, and therefore void. When the law requires a contract to be in writing, it means that the complete contract must be proved by the

¹ *Philips v. Thompson*, 1 Johns. Ch. 132.

² *Gangwer v. Fry*, 5 Harris, 496 ; *Frye v. Shepler*, 7 Barr, 93.

writing. That is not a written contract that is not self-sustaining: it is verbal if it require verbal testimony to sustain it, by proving any essential part of it.¹

§ 235. Another exception to the statute, turning upon similar considerations, is where the agreement is intended by the parties to be reduced to writing, according to the statute, but it is prevented from being done by the fraud of one of them: in such a case, courts of equity have said, that the agreement shall be specifically executed, for otherwise, the statute designed to suppress fraud would be the greatest protection to it. It has sometimes been attempted to except from the statute, all cases where the parties have agreed that their contract should be reduced to writing; but this doctrine, except in cases of fraud, has been expressly denied.²

§ 236. We have also seen, that the specific execution of a contract in equity, is a matter not of absolute right in the party, but of sound discretion in the court; and that it requires a much less strength of case, on the part of the defendant, to resist a bill to perform a contract, than it does on the part of the plaintiff, to maintain a bill to enforce a specific performance: hence, a chancellor will not lend his assistance to an unconscionable bargain, accompanied with circumstances of suspicion, though not positively unfair.³ And a court of equity will refuse a specific performance, in cases where the agreement may be perfectly good and binding upon both parties, and the price agreed to be paid by the purchaser is equal to the value of the property, without the slightest de-

¹ *Soles v. Hickman*, 8 Harris, 180-3; *Greenlee v. Greenlee*, 10 Harris, 236.

² 2 Story's Eq. § 768.

³ *Campbell v. Spencer*, 2 Biun. 129; *Remington v. Irwin*, 2 Harris, 145; *Greenlee v. Greenlee*, 10 Harris, 235.

gree of blame attaching to him.¹ Thus, if trustees for sale, or those acting by their authority, fail in reasonable diligence; if they contract under circumstances of haste and improvidence; if they make the sale with a view to advance the particular purpose of one party interested in the execution of the trust, at the expense of another party; a court of equity will not enforce a specific execution of the contract, however fair and reasonable the conduct of the purchaser may have been.²

§ 237. Again, where poor uneducated parties are induced, by a person who gets hold of them in the absence of their professional adviser, to make an improvident bargain, no assistance will be given by a court of equity towards compelling its execution.³ And in the case of an illiterate person, addicted to intoxication, whose course of life renders him extremely subject to imposition, such habits, though not carried to an excess constituting absolute incapacity, lay a ground for strict examination, whether any instrument executed by him does not, in itself, contain evidence that advantage was taken of those habits.⁴ Inadequacy of price, though not so gross as to amount to fraud, and therefore no ground for setting the contract of sale aside, may be sufficient for refusing to enforce a specific performance of it.⁵ So, if the situation of the parties be so unequal as to give one an opportunity of making his own terms, a court of equity would not be disposed to lend its assistance towards carrying the contract into execution, but would leave the plaintiff

¹ *Henderson v. Hays*, 2 Watts, 161-2.

² *Ord v. Noel*, 5 Madd. 441.

³ *Martin v. Mitchell*, 2 Jac. & W. 423; *Kenneys v. Hansard*, Coop. 129.

⁴ *Say v. Barwich*, 1 Ves. & B. 199; *Cook v. Clayworth*, 18 Ves. 16; *Dunnage v. White*, 1 Swanst. 150; *Mountain v. Bennett*, 1 Cox, 353.

⁵ *Osgood v. Franklin*, 2 Johns. Ch. 23; s. c. 14 Johns. 527.

to his remedy at law, without thinking it necessary to go very accurately into the doctrine of inadequacy of valuation.¹ In short, if the conduct of the party, seeking a specific performance of a contract, be not perfectly conscientious, honourable, and fair; or, if the contract itself be such that a specific execution of it would necessarily, in its consequences to the defendant, produce a loss or injury greatly above the value of the price to be received by him under the contract, and which could not readily have been foreseen, unless by a man perfectly competent to the management of all concerns, possessing at the time an unclouded mind, free from embarrassment, and capable of deliberating and reflecting maturely on what he was about to do; a specific performance, according to the established principles of equity, ought not to be enforced.²

§ 238. And here it may be noticed, that there is a material difference between circumstances which require a chancellor to forbear and those which require him to act. On a question of specific performance he may choose to be silent; and his action, being of grace and not of right, is to be directed by a sound though legal discretion. But circumstances proper for the rescission of an executed contract, involving, as they do, the control of a legal right, are necessarily of a more positive and definite cast. The consequence of the distinction is, that though equity will refuse to interfere for purposes of execution wherever it would revoke, it may refuse to revoke where it would decline to execute.³ A chancellor lends not assistance to an unconscionable bargain, accompanied with circumstances of suspicion, though not positively unfair; but hardship or suspicion of unfairness is

¹ *Lowther v. Lowther*, 13 Ves. 103.

² *Henderson v. Hays*, 2 Watts, 157.

³ *Ley v. Huber*, 3 Watts, 368.

certainly not ground of rescission.¹ The grounds on which equity interferes for rescission, are distinctly marked, and every case, proper for this branch of its jurisdiction, is reducible to a particular head; they are principally fraud, mistake, turpitude of consideration, and circumstances entitling to relief on the principle of *quia timet*;² and each of these should be established by positive and definite proof.³

§ 239. It has been shown, that although time is not generally of the essence of a contract, yet if a party, seeking a specific execution, have been guilty of gross laches, or have been inexcusably negligent in performing the contract on his part; or if, in the intermediate period, there have arisen a material change of circumstances, affecting the rights, interests, and obligations of the parties, a court of equity will refuse to decree a specific performance.⁴ But, although a plaintiff, who has failed to perform his part of the agreement, or where it has become impossible for him to perform it, cannot insist on a specific performance by the defendant; yet, if he have performed so much of his part of the agreement that he cannot be put in *statu quo*, and there be no default in not performing the residue; or he be prevented from completing it by the default of the defendant, he is entitled to specific performance.⁵

§ 240. Courts of equity will also relieve a vendor, by decreeing a specific execution, where he has been unable to comply with his contract, according to the terms of it, from the state of his title at the time, if he come within

¹ Davidson v. Little, 10 Harris, 251.

² Delamater's Estate, 1 Wh. 374.

³ Yard v. Patton, 1 Harris, 282.

⁴ Tiernan v. Roland, 3 Harris, 438; Cook v. Grant, 16 S. & R. 210.

⁵ Larison v. Burt, 4 W. & S. 28; Greenlee v. Greenlee, 10 Harris, 235. See Oakley v. Morton, 1 Kern. 32-3.

a reasonable time, and the defect be cured.¹ But as a party can successfully come into equity for an execution of the contract, only on the basis of strict propriety of conduct, a chancellor will not compel a vendee to take an estate of which the vendor was not the owner at the sale, or at least had not a legal or an equitable means to make himself so; and this, because one who speculates on what is not within his control, is not a *bonâ fide* contractor. His contract wants the indispensable ingredient of mutuality, because it would be impossible to execute in favour of the vendee, if the vendor should be unable to procure the title.² But if the seller, though not the legal owner, have an equitable means to make himself so, and if he employ that means successfully, though subsequently to his contract of sale, he may compel a specific performance; for in this there is nothing inequitable.³ Thus the owner of land, which has been sold for taxes, has a perfectly legal and efficient means of becoming the absolute owner, by redemption, within the time prescribed by law, and consequently, may have a decree for a specific performance.⁴

§ 241. And although an estate be sold free from incumbrances, and the abstract show an amount of incumbrances exceeding the purchase money, yet it must be considered that the seller can make a good title, and for this plain reason, that from the existence of such incum-

¹ 2 Story's Eq. § 777; *Magaw v. Lothrop*, 4 W. & S. 321; *Moss v. Hanson*, 5 Harris, 382.

² *Ley v. Huber*, 3 Watts, 368.

³ *Tiernan v. Roland*, 3 Harris, 436.

⁴ *Ley v. Huber*, 3 Watts, 367. The rule in equity is to decree a specific execution of a contract for the sale of land, on the application of the vendor, if the latter be able to make a good title, at any time before the decree is pronounced. This rule has its exceptions in cases where a contract is made in bad faith, by one who knows that he has neither title, nor the legal or equitable means of procuring one. *Moss v. Hanson*, 5 Harris, 382.

branches, no fair inference can be drawn that the seller has neither the ability nor disposition to remove them, if the purchaser be otherwise content to execute his part of the bargain. It would be a most unreasonable thing to ask a vendor to extinguish money liens on his land, until it was ascertained that the vendee would complete his purchase. In the nature of things this is a step immediately preceding the consummation of the final treaty. In equity, on a bill to enforce specific performance, such a vendor must show that he could, within a reasonable time, have removed the incumbrances, had the vendee waived his other unsound objections to the title, and he must actually extinguish them before the court compels payment of the purchase money.¹ And though equity will not compel a vendee to take a defective title, it will compel him to take a good title subject to a pecuniary charge, against which adequate security has been given.² He will not, however, be compelled to accept a title, subject to the incumbrance of a ground rent which cannot be extinguished.³

§ 242. It is an invariable rule in a court of chancery, that a purchaser shall not be compelled to accept a doubtful title, nor will the court compel him to take an estate which it cannot warrant to him; so that, on a bill for specific performance, the question really is, not so much whether the vendor's title be good, as whether it be so clearly so, as to justify the court in directing the vendee to take the estate and pay his money for it.⁴ A

¹ Dalzell v. Crawford, 1 Pars. 52-3.

² Thompson v. Carpenter, 4 Barr, 134; Tiernan v. Roland, 3 Harris, 441. And see Clarke v. Seirer, 7 Watts, 112.

³ Gans v. Renshaw, 2 Barr, 37.

⁴ Bumberger v. Clippinger, 5 W. & S. 314; Creigh v. Shatto, 9 W. & S. 83-4; Gans v. Renshaw, 2 Barr, 35; Pyrke v. Waddingham, 17 Eng. L. & Eq. 539.

marketable title, in equity, is one in which there is no doubt involved, either as to matter of law or fact; for no title will be forced on a purchaser, which is not so free from difficulty, as to law and fact, that, on a re-sale, an unwilling purchaser shall be unable to raise any objection, which may appear to a chancellor so doubtful, that a title involving it ought not to be enforced. These doubts must, however, in the language of Lord Eldon,¹ be "considerable and rational," such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous, and astute niceties, but such as produce real, *bonâ fide*, hesitation in the mind of the chancellor.² A general agreement to sell a property,

¹ *Scapleton v. Scott*, 16 Ves. 272.

² *Dalzell v. Crawford*, 1 Pars. 46; *Wetherill v. Meeke*, Bright. R. 135. If the doubts arise upon a question connected with the general law, the court is to judge whether the general law upon the point is or is not settled, enforcing specific performance in the one case, as in *Moody v. Walters*, 16 Ves. 283, 312, and *Biscoe v. Perkins*, 1 Ves. & B. 485, 493; and refusing to enforce it in the other, as in *Bloss v. Lord Clanmorris*, 3 Bligh, 62, and *Sloper v. Fish*, 2 Ves. & B. 145. If the doubts arise upon the construction of particular instruments, and the court be itself doubtful upon the points, specific performance must of course be refused, as in *Sheffield v. Lord Mulgrave*, 2 Ves. Jr. 526, 529, *Willcox v. Bellaers*, 1 T. & R. 491, 495, and *Jervoise v. The Duke of Northumberland*, 1 J. & W. 559, 569; the doctrine in which case has been followed by the Vice-Chancellor Knight Bruce, in *The Earl of Lincoln v. Arcedeckne*, 1 Coll. 98; and even though the court may lean in favour of the title, its duty is either, as expressed by Lord Eldon, in *Jervoise v. The Duke of Northumberland*, following in effect what had been said in *Sheffield v. Lord Mulgrave*, to consider whether it would trust its own money upon the title; or, at least, as stated by the same learned judge in *Lord Braybroke v. Insip*, 8 Ves. 428, with reference to the doubt upon the legitimacy to weigh whether the doubt is so reasonable and fair that the property would be left in the purchaser's hands not marketable. If the doubts which arise may be affected by extrinsic circumstances, which neither the purchaser nor the court has the means of satisfactorily investigating, specific performance is to be refused, according to *Lowes v. Lush*, 14 Ves. 547; *Hartley v. Smith*, Buck's B. Cases, 368; and *Smith v. Death*, 5 Madd. 371-2; *Pyrke v. Waddingham*, 17 Eng. L. & Eq. 539; s. c. 10 Hare, 1. And see *Creigh v. Shatto*, 9 W. & S. 83-4.

means a sale in fee simple, and chancery will not compel a purchaser to take a life estate;¹ nor will a party contracting for the entirety of an estate be compelled to take an undivided part of it.² So where two parcels of land are sold as one tract, a good title to both is essentially necessary to sustain a bill for specific performance.³ But there is an admitted difference in respect to this matter, betwixt a vendor and a vendee; for the latter may insist on having the part to which title can be made, though the former could not have compelled him to accept it.⁴

§ 243. The mere transmission of the legal title to another, subject to the equity of the purchaser, creates no impediment to a decree for a specific performance, especially when the parties had the sale in view at the time of the transmission; for if the purchaser get the estate he bargained for from the parties with whom he contracted, or their privies, it is all that in equity he can ask.⁵ The conveyance, in such case, constitutes the assignee a trustee, for the purpose of carrying into effect the agreement for the sale of the land.⁶

§ 244. Unless the contract has been founded upon a valuable or other meritorious consideration, or what is so considered in a court of equity, as the payment of debts, a specific performance will not be decreed. In general, a court of equity will not interfere to carry into effect unexecuted voluntary contracts, *inter vivos*, but will leave the parties to their remedies at law.⁷ An executory contract must have a consideration to support it,

¹ *Tiernan v. Roland*, 3 Harris, 435-6; *McFarson's Appeal*, 1 Jones, 511.

² *Dalby v. Pullen*, 3 Sim. 29.

³ *Barton v. Bouvier*, 12 Leg. Int. 13.

⁴ *Clark v. Seirer*, 7 Watts, 110.

⁵ *Tiernan v. Roland*, 3 Harris, 436.

⁶ *De Chaumont v. Forsythe*, 2 Penn. R. 515; *Kerr v. Day*, 2 Harris, 117.

⁷ *Yard v. Patton*, 1 Harris, 285; *Read v. Robinson*, 6 W. & S. 331.

without which equity will no more execute it, than the law would make the breach of it the subject of compensation.¹ But this, in the absence of fraud or mistake, is the extent to which the principle is carried, for the doctrine is to be understood with the qualification, that although chancery will withhold its aid to consummate a voluntary agreement, unexecuted, where something remains to be done by the contracting parties, yet where it is executed, equity will give effect to all its consequences.²

§ 245. The ground upon which a chancellor executes an executory contract for the sale of lands, is, that equity looks upon things agreed to be done, as actually performed; consequently, when an agreement is made for the sale of an estate, the vendor is considered as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor.³ The vendee is, in contemplation of equity, actually seised of the estate, and is, therefore, subject to any loss which may happen to it, between the agreement

¹ *Kennedy v. Ware*, 1 Barr, 450; *Campbell's Estate*, 7 Barr, 100; *Greenlee v. Greenlee*, 10 Harris, 235. "There is no such thing as the execution of a gift of lands, under the statute of frauds, even between father and son. Gift is indeed a common law mode of assurance, but it is a contract *executed*. Contracts, to be executed by the extraordinary powers of a chancellor, in spite of the statute of frauds, must be executory, and must be founded on a valuable consideration. It is true, the consideration may be in a prejudice to the vendee, as well as in a benefit to the vendor: and if it be said that a son, who goes upon land under a promise of a conveyance from his father, and expends his labour and money in making valuable improvements, which cannot be reasonably compensated, is entitled to a decree of conveyance, it is because he is a purchaser for a valuable consideration. It is inaccurate language to call such a contract a gift." *Moore v. Small*, 7 Harris, 469.

² *Yard v. Patton*, 1 Harris, 285.

³ *Rangler's Appeal*, 3 Barr, 378; *Williams v. Tiernan*, Add. 349; *Green v. Smith*, 1 Atk. 572; *Craig v. Leslie*, 3 Wheat. 578; *Stewart v. Freeman*, 10 Harris, 123.

and the conveyance, and will enjoy any benefit which may accrue in the same interval. As a consequence, he may sell or charge the estate before conveyance executed;¹ it is subject in his hands to dower, and to all the incidents of real estate, and upon his death it goes to his heirs and not to his personal representatives;² and the death of either vendor or vendee, even before the time of completing the contract, is held to be entirely immaterial.³ As a result of this principle, which seems to be of general application, it is settled, that an estate, under contract of sale, is regarded as converted into personalty from the time of the contract, notwithstanding an election to complete the purchase rests entirely with the purchaser; and, if the seller die before the election be exercised, the purchase money, when paid, will go to his executors as assets.⁴ But if, from defect of title, insufficiency of contract, or other cause, the court should think the contract ought not to be carried into execution, a conversion is prevented, and the estate will go to the heir at law of the vendor, as though no contract had ever existed.⁵ So also, if one covenant to lay out a sum of money in the purchase of land, generally, and devise his real estate before he has made the purchase,

¹ *Seton v. Slade*, 7 Ves. Jr. 265; 1 Ves. 220; 6 Ves. Jr. 352.

² *Longwell v. Bently*, 11 Leg. Int. 134.

³ *Winged v. Lofebury*, 2 Eq. Cas. Abr. 32, pl. 43; *Paul v. Wilkins*, Toth. 106; *Baker v. Hill*, 2 Ch. R. 113.

⁴ *Fisher v. Harris*, 10 Barr, 459; *Sikes v. Lister*, 5 Vin. Abr. 561, pl. 28; *Baden v. Pembroke*, 2 Vern. 213. "This conversion takes place notwithstanding that it may afterwards be defeated by the non-payment of the purchase money. Even where the conversion is subject to the happening of a contingency, the property will be taken to be as of the nature it was intended to be upon the happening of the contingency." *Longwell v. Bently*, 11 Leg. Int. 134.

⁵ *Rangler's Appeal*, 3 Barr, 378; *Lacon v. Waters*, 3 Atk. 1; *Buckmaster v. Harrop*, 7 Ves. Jr. 361; *Rose v. Conyngham*, 11 Ves. Jr. 550.

the money agreed to be laid out will pass to the devisee, as representing land.¹ These illustrations of the doctrine of conversion are familiar instances, in which the rule, that agreements to be performed are considered as performed, has been practically applied.²

§ 246. No rule is more firmly established in equity, than that land directed to be converted into money, or money directed to be converted into land, is to be treated as that species of property, into which one or the other is directed to be converted.³ Such a direction, in a will or other instrument, indelibly impresses the subject of it with the character of realty or personalty, as the case may be, although there be in fact no conversion;⁴ but in general, it only retains that character down to the period of its first descent; after money, impressed with the character of realty, enters into the possession of the first distributee, it assumes its natural character, and is from thenceforth governed by the laws regulating the transmission of personalty.⁵ It is to be observed, however, that where the whole beneficial interest in the land or money, directed to be converted, belongs to the person for whose use it was given, equity will permit him to take in land or money, as the subject happens to be at the moment. But the right of election must be actually and unequivocally exercised, and the *onus* of showing the act of election, lies on the party alleging it. So, where there are several interested in the subject matter, all must agree to elect; an election by a less number than the whole amounts to nothing; they cannot compel their associates

¹ *Green v. Smith*, 1 Atk. 573.

² *Kerr v. Day*, 2 Harris, 114.

³ *Allison v. Wilson*, 13 S. & R. 332; *Wells v. Sloyer*, 3 Penn. L. J. 206.

⁴ *Burr v. Sim*, 1 Wh. 252; *Wells v. Sloyer*, 3 Penn. L. J. 206; *Morrow v. Brenizer*, 2 Rawle, 185.

⁵ *Dyer v. Cornell*, 4 Barr, 359.

to elect to take as land that which is bequeathed to them as money, or *vice versâ*.¹

§ 247. Before concluding this branch of the subject, it will be proper to consider the questions of compensation and damages, which chiefly, although not exclusively, arise on bills for specific performance. The general rule is, that for breaches of contract, and other wrongs and injuries cognizable at law, equity does not entertain jurisdiction to give redress by way of compensation or damages, where these constitute the sole object of the bill; there being, in such cases, a plain, complete, and adequate remedy at law. Where, however, compensation or damages are incidental to relief, the jurisdiction properly attaches in equity as inseparable from proper relief. It is where no other claim for relief is presented, and where the remedy at law is plain, direct, and unembarrassed by any complexity in the subject matter of the claim for compensation or damages, that the jurisdiction in equity becomes questionable. If it do attach in any other case, it must be under very special circumstances, and upon peculiar equities; as, for instance, in cases of frauds, or where the party has disabled himself by matters *ex post facto* from a specific performance; or in cases where there is no adequate remedy at law.² The mode by which such compensation or damages are ascertained, is either by a reference to the master, or by directing an issue *quantum damnificatus*, which is tried by a jury.³

§ 248. The most usual cases in which plaintiffs may have compensation in equity, are those in which a specific performance is decreed, with an allowance for any deficiency as to the quantity, quality, or description of

¹ *Miller v. Meetch*, 8 Barr, 425; *Wells v. Sloyer*, 3 Penn. L. J. 203.

² *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. 219-20.

³ *Ibid.* 220.

the property, or for any delay in performing the contract.¹ But where compensation is sought by the defendant, in resistance or modification of the plaintiff's claim, the maxim prevails, that he who seeks equity shall do equity. Thus, where a party is lawfully in possession, under a defective title, and has made improvements on the land, if relief be asked in equity by the true owner, he will be compelled to allow for the improvements. Indeed, courts of equity have not confined the doctrine of remuneration or lien for repairs and improvements to cases of agreement or purchase; it is of general application, and is extended to all cases, where the party making the repairs and improvements has acted *bonâ fide* and innocently, and substantial benefit has been conferred on the owner; so that, *ex equo et bono*, he ought to pay;² but if the defendant have been guilty of *mala fides*, and have endeavoured to deceive the plaintiff, he is not entitled to the benefit of this wholesome principle.³

§ 249. Where the inability of a defendant to fulfil his contract is set up as a bar to the relief sought by the complainant, the latter is entitled to have the contract fulfilled as far as practicable, and to obtain compensation on those points which do not admit of fulfilment. Thus, where a suit was brought for specific performance, by a vendee against the vendor, who had disabled himself from fulfilling the contract, by selling part of the land to a third person; it was contended on behalf of the defendant, that as the execution of the original contract had become impossible, equity would not make a new one, and that the complainant must, consequently, be

¹ 2 Story's Eq. § 796; *Hawk v. Greensweig*, 2 Barr, 295.

² *Beeson v. Beeson*, 9 Barr, 288.

³ *Werkheiser v. Werkheiser*, 3 Rawle, 335; *Dilworth v. Sinderling*, 1 Binn. 495; *Larison v. Burt*, 4 W. & S. 27.

remitted to his action at law for damages; but the court held, that a party ought not to be allowed to set up his own default as a bar to a right, which would have been valid, if that default had not happened; and that the vendee was, consequently, entitled to have the contract carried into effect as far as practicable, and to receive compensation for that part which could not be executed.¹

¹ *Waters v. Travis*, 9 Johns. 450; 2 Lead. Cas. Eq., part 2, p. 35. As to the rule of compensation, see *Dustin v. Newcomer*, 8 Harris, 49; *Young v. Frost*, 1 Maryland R. 377.

CHAPTER XII.

SPECIFIC PERFORMANCE OF DECEDENTS' CONTRACTS.

§ 250. BESIDES the general equitable jurisdiction to enforce the specific performance of agreements, which has been already considered, the several orphans' courts of this state are, by the act of 1834,¹ invested with the power to carry into effect the contracts of decedents for the sale of lands, "wherever any person shall, by a bargain or contract in writing, bind himself to sell and convey any real estate in this commonwealth, and shall die seised or possessed of such real estate, without having made any sufficient provision for the performance of such bargain or contract;" and also, where a decedent shall have entered into a like contract, by parol, and "such parol contract shall have been so far executed that it would be against equity to rescind the same;" or, by act of 1853, "whenever a decedent shall have contracted, by parol, to sell real estate, and those interested do not think it expedient to plead the statute, requiring contracts to be in writing, to enable the purchaser to recover the real estate agreed to be sold."² The purpose of these acts was to confer upon the orphans' courts, the power exercised by a court of chancery, to compel the specific fulfilment of contracts for the sale and conveyance of land, made by decedents who die without providing for the exe-

¹ Purd. Dig. 161-2.² Ibid. 699.

cution of their agreements. Wherever, therefore, a chancellor would, in these cases, direct a conveyance to be made in discharge of a decedent's undertaking, the proper orphans' court is bound to interpose its statutory authority with like effect.¹

§ 251. As a general rule, it is said, that to entitle an agreement to be specifically performed, it must be executed according to the forms prescribed by law, by parties able and willing to contract, and should be certain and defined, fair and equal. But no express form of words is necessary to its validity: any memorandum in writing, indicative of the intent of the parties, and so precise as to enable the inquirer to ascertain the terms of the contract, the land to be conveyed, and the price to be paid for it, is sufficient.² Thus, a correspondence by letters, which reasonably import a conclusion, has been sustained as an agreement:³ and this, though the person did not intend to be bound,⁴ or looked to the execution of a more formal instrument.⁵ And the statute of frauds is satisfied by any note in writing, showing that there is a contract, though not under seal;⁶ and it is enough that it be signed by the party to be charged, if the other party have accepted it.⁷ The contract must, however, have a valuable consideration to support it,

¹ *M'Farson's Appeal*, 1 Jones, 508; *M'Kee v. M'Kee*, 2 Harris, 235; *Chess's Appeal*, 4 Barr, 54.

² *Walpole v. Orford*, 3 Ves. 420; *Buxton v. Liston*, 3 Atk. 385.

³ *Wetherill v. Seitzinger*, 9 W. & S. 177; *Huddleston v. Briscoe*, 11 Ves. 591; *Stratford v. Bosworth*, 2 Ves. 366.

⁴ *Wilford v. Beazly*, 1 Ves. 8; s. c. 3 Atk. 503.

⁵ *Fowler v. Freeman*, 9 Ves. 351.

⁶ *Colt v. Selden*, 5 Watts, 528; *M'Farson's Appeal*, 1 Jones, 510. There is no authority for saying that the writing must be with ink; a writing in pencil is sufficient. *Hill v. Scott*, 2 Jones, 169-70.

⁷ *Lowry v. Mehaffy*, 10 Watts, 387; *Worrall v. Munn*, 1 Seld. 229.

for a voluntary unexecuted agreement is not within the act.¹

§ 252. An agreement made, on a valuable consideration, to devise lands, is within the equity of the statute, and will be specifically enforced. The draftsman of the act had, no doubt, in view, the case of an ordinary bargain and sale; but as the statute is remedial and highly beneficial, it is to be largely expounded. What difference can it make, in reason or justice, whether the conveyance was to be by deed or will? The same good faith, which requires it to be enforced in the one case, requires it to be enforced in the other, not in form but in effect.² The act applies to every contract made on a valuable consideration, whether for money or otherwise.³

§ 253. In a proper case, the statute provides that "it shall be lawful for the executors or administrators of such decedent, or for the purchaser of such real estate, or other person interested in such contract, to apply, by bill or petition, to the orphans' court having jurisdiction of the accounts of such executors or administrators, setting forth the facts of the case."⁴ The bill or petition must aver that the plaintiff is willing, and offers to perform the agreement on his part; but an omission to make such statement is a defect in form merely, which may be amended.⁵ It must not, however, be a bill for discovery, for although the orphans' court may require an answer on oath, it cannot compel a discovery touching the matters set forth in the bill or petition.⁶ A prayer for general relief is sufficient.⁷

¹ Hagerty's Case, 4 Watts, 305; Moore v. Small, 7 Harris, 468-9.

² Brinker v. Brinker, 7 Barr, 55.

³ Meanor v. M'Kowan, 4 W. & S. 305.

⁴ Purd. Dig. 161.

⁵ Chess's Appeal, 4 Barr, 52.

⁶ Brinker v. Brinker, 7 Barr, 54-5.

⁷ Ibid. 56.

§ 254. The first step consequent upon the presentation of the petition is, to fix a day for the answer of the defendants, and to give them notice thereof, by citation or otherwise.¹ The act directs due notice of the bill or petition to be given "to the purchaser, or the executors or administrators, and heirs of the decedent, or devisees of such estate, as the case may require, to appear in such court, on a day certain, and answer such bill or petition."² The anxiety of the law makers to secure to the defendants a day in court, after due notice, so sedulously manifested, is but in accordance with the principle, that before the rights of an individual can be bound by a judicial sentence, he shall have notice of the proceeding against him. Such notice is indispensably necessary to give jurisdiction over the person of the party; and it has been truly said, that without citation and an opportunity of being heard, the judgment of a court, whether ecclesiastical or civil, is absolutely void.³

§ 255. The act further provides, that "such court shall have power, if the facts of the case be sufficient in equity, and no sufficient cause be shown to the contrary, to decree the specific performance of such contract, according to the true intent and meaning thereof."⁴ The only final decree contemplated by the statute is one for a specific performance;⁵ the orphans' court has the same power and authority as a court of chancery, in such cases, to decree, and by necessary implication, to enforce by attachment, a specific performance of the contract according to its true intent and meaning. This is a power certainly exercised by courts of chancery. They have

¹ M'Kee v. M'Kee, 2 Harris, 236.

² Purd. Dig. 161.

³ M'Kee v. M'Kee, 2 Harris, 237; Com. v. Green, 4 Wh. 568.

⁴ Purd. Dig. 161-2.

⁵ M'Kee v. M'Kee, 2 Harris, 237.

authority to decree and compel a specific performance by an infant heir, or any other person, of any bargain, contract, or agreement, made by any party who may die before the performance thereof. The remedy is administered as here, on petition of the executors or administrators of the estate, or of any person or persons interested in such bargain, &c., hearing all parties concerned, and being satisfied that the specific performance ought to be decreed or compelled.¹ There is another well ascertained principle, proper to be noticed, as applicable to the inquiry we are now prosecuting: it is, that executory contracts for the sale of lands, like wills, are to be interpreted to give effect to the intention of the parties. Therefore, in equity, where they operate as conveyances, an express limitation to the heirs of the vendee, is not indispensably required to carry a fee; for words of inheritance will be supplied, where the consideration paid, or other circumstances, evince that no less than a fee was intended. Generally, a covenant to make a lawful deed of conveyance, or a sufficient title, is understood to mean a fee.²

§ 256. The order or decree of the orphans' court for the specific performance of any such contract, being duly certified by the clerk of the court, may be recorded in the office for recording of deeds, in the county where such real estate is situate; in like manner as deeds are recorded, and with the same effect. And when such order or decree shall have been made, and the purchase money paid or secured, according to the terms of the contract, it becomes the duty of the executors or ad-

¹ Chess's Appeal, 4 Barr, 54-5.

² M'Farson's Appeal, 1 Jones, 511; *Dearth v. Williamson*, 2 S. & R. 500; *Defraunce v. Brooks*, 8 W. & S. 68-9; *Tiernan v. Roland*, 3 Harris, 435-6.

ministrators of the decedent, to execute such deed of conveyance, as shall be directed by the court, in conformity with the intention of the contract; and the same being so made, is of the same force and effect to pass and vest the estate intended, as if it had been executed by the decedent in his lifetime. If the party to whom the deed is to be made be an executor or administrator of the decedent, the deed must be made, as in other cases, by the co-executor or co-administrator, if there be one; and if there be none, then the deed is to be executed by the sheriff, in compliance with the decree of the court, and be delivered by the sheriff to the grantee, upon such terms' as the court shall see fit to require from the grantee, as executor or administrator of the decedent, for securing the faithful appropriation of the unpaid purchase money.¹

§ 257. The contract being established, the parties stand at the execution of it, as the vendor and vendee would have stood, and with the same reciprocity of recourse. If the articles require not an unincumbered title, the vendee cannot have it; he must content himself with the title subject to the widow's dower, for he could have called on the vendor for no more. If he have a right to a clear title, though unable to enforce it specifically, he is not bound to accept of less, but may resort to an action for damages. But if he be willing to accept of such a title as the administrator can give, he may, if it be withheld, retain his equitable title, paying or tendering the residue of the purchase money, or rescind the contract by an action for the breach of it; and this he might do, had he to deal with the vendor in person. On the other hand, if the administrator wish to recover

¹ Purd. Dig. 162.

the purchase money, or avoid an action for damages, it behooves him, where the vendor was bound for a title, to procure as best he may, the widow's relinquishment of her dower, else the contract will be at an end for every purpose but to charge him. It is not an objection to say there was no design to give him power over her will. For purposes of liability, he stands in the place of her husband, who, although unable to control it, was answerable in damages for the exercise of it; and no more is claimed in regard to his representative.¹ The acceptance of a conveyance is, however, a waiver of the right to a title clear of the widow's dower.²

§ 258. In addition to the remedy by a decree for a specific performance, the acts of 1792 and 1818³ provide a method for taking proof, in the courts of common pleas, of the unexecuted real contracts of decedents, previous to the institution of any suit for the breach of them, and enable the executor or administrator to make the necessary conveyance, under the order of the court.⁴ The mischief intended to be remedied by these acts was, that in case of death, there might remain a contract of the deceased binding on his executors or administrators, but no person in being capable of carrying it into specific execution. The purchaser of land might be willing to pay the purchase money on receiving a conveyance; the executor might stand in need of these moneys to discharge debts and legacies; yet notwithstanding, there being no competent grantor, the contract must be rescinded or delayed, or a suit brought in a court of law to recover damages for its non-performance. The acts of assembly, therefore, require the contract to be judicially proved, before suit brought, and then empower the exe-

¹ Riddlesberger v. Mentzer, 7 Watts, 142.

² Shurtz v. Thomas, 8 Barr, 363.

³ *Purd. Dig.* 159-61.

⁴ M'Kee v. M'Kee, 2 Harris, 235.

cutor or administrator to execute a deed to the purchaser. The proceedings under these acts are in the court of common pleas, who, in the first place, receive proof of the contract, and afterwards, if there be any difficulty as to the right to a specific performance, it must be enforced by suit brought in the same court, through the medium of a jury.¹

§ 259. Wherever real estate has been conveyed reserving a ground rent, with the right to demand a release or extinguishment thereof, upon the payment of a sum of money or other equivalent specified in the deed, and the grantor or owner of the ground rent shall die, and thereby, or in any other manner, the right to the rent reserved shall become vested in minors, trustees, or other persons not authorized to release or extinguish the ground rent, the act of 5th February 1821, authorizes the executors or administrators of the grantor, or other owner of the rent, the guardian of such minor, or trustee, or other person authorized for the time being to receive the rent; or the grantee, or his heirs, or assigns, of the real estate out of which the ground rent may have been reserved, to present a petition to the supreme court, or to the court of common pleas of the proper county, praying that a release or discharge of such ground rent may be executed by such executor or administrator, guardian, trustee, or other person authorized for the time being to receive the same, in such manner and form as the court shall judge to be consistent with the true intent and meaning of the parties to the deed; whereupon the court, having considered the prayer of the petition and the evidence of the contract, and having adjudged the same to be obligatory, shall make an order authorizing such persons to execute a release

¹ Chess's Appeal, 4 Barr, 53-4.

of the ground rent reserved, upon payment of the sum specified in the deed, with all arrearages of the rent. The court may also, in their discretion, require from the person so authorized to extinguish the ground rent, security for the legal appropriation of the consideration for such extinguishment.¹

§ 260. The act of 13th June 1836,² provides a similar remedy for enforcing the specific performance of the real contract of a person, who shall subsequently be found by inquisition to be a lunatic or habitual drunkard, as is provided in the case of the contract of a decedent; with the exception, that the proceedings are to be had in the court of common pleas having jurisdiction of the accounts of the committee; and that, on a decree being made for a specific execution of the contract, the conveyance is to be executed by the committee of such lunatic or habitual drunkard. And either of the parties, when facts are controverted, may require a decision thereon by a jury.

§ 261. If any person, so found to be a lunatic or habitual drunkard, shall have previously contracted for the purchase of any real estate within this commonwealth, the court may, in like manner, on the application of the vendor, or of the committee, or of any person interested in such contract, make such order for the performance of the contract, as shall be according to the rules of equity, and the terms of the contract; or, on the application of the committee or other person interested, with the assent of the vendor, make a decree for the rescinding of such contract, if such proceeding shall not be disadvantageous to the estate of such lunatic or habitual drunkard, upon such terms as shall be equitable and just.³

¹ Purd. Dig. 413.

² Ibid. 554.

³ Ibid.

CHAPTER XIII.

INTERPLEADER.

§ 262. ANOTHER head of the concurrent jurisdiction of courts of equity, is that of interpleader. A bill of interpleader is a bill filed for the protection of a person, from whom several persons claim, legally or equitably, the same thing, debt, or duty; but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. The equity is, that the conflicting claimants should litigate the matter amongst themselves, without involving the stakeholder in their dispute.¹ By our statutes, the courts before enumerated² are invested with the powers and jurisdiction of courts of chancery, so far as relates to “the determination of rights to property or money claimed by two or more persons, in the hands or possession of a person claiming no right of property therein.”³

§ 263. The principle on which this jurisdiction is based, (that of protecting a mere stakeholder between conflicting claimants,) was always recognised at common law, and was applied where a chattel had come to a man's possession by accident, or by bailment from both claimants jointly, or from those under whom both made

¹ Adams' Eq. 202; *Bedell v. Hoffman*, 2 Paige, 199.

² Ante, § 35. The jurisdiction of the supreme court, in such cases, extends throughout the state. *Purd. Dig.* 308.

³ *Purd. Dig.* 305-6.

title.¹ And though the common law interpleader process was principally confined to the action of detinue, yet, in equity, the principle was as wide as the demands of justice required. And the principles of equity being a part of our common law, our interpleader is no less expansive in its principles than the equity process.² Under our practice, where the stakeholder is sued, he may take the simple course of giving notice to another, claiming the money or thing in controversy, to come in and defend the action or be barred of his claim. If, after appearing and pleading, the defence be neglected or abandoned, the party is forever barred. Much more will this be the case, if a party defend the cause and lose it.³ But this course does not, in all cases, conclusively save the stakeholder from his liability to action by the claimant, for the latter not being a party on the record, is not barred by the judgment, until the fact of notice is properly proved. The stakeholder is not, therefore, conclusively protected by such judgment; for his proof of the notice may fail him. Besides, if the stakeholder fail, he may have to pay the costs himself, without any recourse.⁴

§ 264. It would, therefore, seem more prudent for the defendant to pursue the regular common law form, of coming in and filing his petition or suggestion, admitting the debt or duty, and his willingness to pay or perform; stating the claim of the third person, and praying for a *scire facias* to bring him in to interplead. Thus, the third person, called the garnishee, (from being the person warned) is compelled to come in and set up his claim,

¹ Adams' Eq. 202.

² M'Munn v. Carothers, 2 Am. L. J. 134; Coates v. Roberts, 4 Rawle, 100.

³ Coates v. Roberts, 4 Rawle, 111; Bird v. Neff, 1 T. & H. Pr. 374.

⁴ M'Munn v. Carothers, 2 Am. L. J. 135.

and is concluded by the proceeding, without extraneous proof. By the service of the *scire facias* the garnishee actually becomes a party, and if he make default, the plaintiff will have judgment to recover the money or thing claimed from the defendant, and his damages and costs from the garnishee. If the garnishee come in and disclaim, the plaintiff recovers of course. If he defend unsuccessfully, the plaintiff will have judgment for the thing claimed against the defendant, and for his costs and damages against the garnishee. If the garnishee plead, the issue to the court or jury is between him and the plaintiff, and the defendant stands aside altogether, and has nothing further to do but pay the money or deliver the thing sued for, according to the judgment of the court.¹

§ 265. If the plaintiff recover, he has judgment against the defendant for the thing claimed, and against the garnishee for damages and costs; and if the garnishee recover, he shall have judgment against the defendant for the thing claimed, and against the plaintiff for his damages and costs. If however the money be in court, the judgment of course is, that the party recovering shall take it out of court. Usually, when the suit is for money, the defendant offers to bring it into court, and often does bring it; and if it be for some other thing, he keeps it safely to abide the order or judgment of the court. If the stakeholder be sued by two claimants severally, he must sue out his *scire facias* to interplead, in the suit first brought; or, if they be both brought at once, then in the one in which the declaration shall be first filed, or which the court shall direct.² The act of 1836³ prescribes a special remedy by interpleader, in suits

¹ Ibid. 135-6.

² Ibid. 136.

³ Purd. Dig. 245.

brought in the district court of Philadelphia, which has been subsequently extended to the court of nisi prius, and to the courts of common pleas of Berks and Schuylkill counties.

§ 266. Where a suit is only apprehended, the stakeholder is driven, of necessity, to a court of equity for protection; a court of law being in such case without power to grant relief. A bill of interpleader lies, where a person claiming no right in the subject, and not knowing to whom to render a debt or duty, apprehends injury from claims made by two or more claiming in different rights the same debt or duty. A mere claim is now the subject of such bill, and that the one claim in a legal, and the other an equitable right. It is granted on an affidavit, by the plaintiff, that the bill is not exhibited by fraud or collusion, but for his own security; but it need not state that it is at his own expense, nor that it is filed without the knowledge of either party. The bill must show that there are two persons in existence, each of whom claims the property; if one of them do not appear, or will not support his claim, the debt is given to the one who does appear, and a perpetual injunction is granted as to the other.¹ Thus, where there are several persons claiming rent in the hands of the assignee of a term, the controversy may be settled by a bill of interpleader.² But in such case, the two persons must claim the same rent in privity of tenure or of contract; for where the claimants assert their rights, under adverse titles, and not in privity, the bill is not maintainable.³

§ 267. In order to maintain a bill of interpleader, the same thing, debt, or duty must be claimed by both par-

¹ *Coates v. Roberts*, 4 Rawle, 109.

² *Adams v. Beach*, 7 Leg. Int. 178.

³ 3 Dan. Ch. Pr. 1754, 1758.

ties. Thus, where an auctioneer, by direction of the owner, had sold to two persons successively, and had received a deposit from each, it was held that the auctioneer could not support a bill of interpleader against the owner and the two purchasers; because, although there was one question in common between the purchasers, namely, which was to be the purchaser of the estate, their claims as against the auctioneer were for two different things, namely, by each for his own deposit. The bill, therefore, was dismissed as against the second purchaser with costs, and it was decreed that the seller and the first purchaser should interplead as to the first deposit. And again, at law, where a purchaser of tea was sued by the seller for the price, and was also sued in trover by a person who alleged himself to be the real owner, it was held not to be a case of interpleader; for the parties were not seeking the same thing. The one was endeavouring to obtain the price of the goods, the other damages for their conversion.¹

§ 268. Again, the party seeking relief must have incurred no independent liability to either claimant. In the case, therefore, of a tenant sued by his landlord, or an agent by his principal, a claim adverse to the landlord or principal, will not warrant a bill of interpleader, unless it originate in his own act, done after the commencement of the tenancy or agency, and creating a doubt who is the true landlord or principal, to whom the tenancy or agency refers.² In like manner, a bill of interpleader will not lie, if the party seeking relief have ac-

¹ *Glyn v. Duesbury*, 11 Sim. 139; *Hoggart v. Cutts*, Cr. & P. 197; *Slaney v. Sidney*, 14 Mee. & W. 800; *Adams' Eq.* 204.

² Where a person deposits money in a bank, as agent for the trustees of a corporation, he may be compelled to interplead with other parties claiming to be the trustees. *Ware v. The Western Bank*, 1 T. & H. Pr. 373.

knowledge a title in one of the claimants, and have thus incurred an independent liability to him. Thus, where a company has registered what is alleged to be a forged transfer of shares, and is sued by the original shareholder for dividends, and another is threatened by the alleged transferee, an interpleader will not be allowed.¹ If misrepresentation were used to obtain that acknowledgment, it may create an equity to be released from the liability; but the right of the party deceived to insist on such release, is not matter of interpleader between the real and apparent owners.²

§ 269. The case tendered by every such bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants, beyond those which arise from the title to the property in contest; if the plaintiffs have come under any personal obligation, independently of the question of property, so that either of the defendants may recover against them at law, without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiff; an injunction, which is of course, if the case be a proper subject for interpleader, would deprive a defendant, having such a case beyond the question of property, of part of his legal remedy, with the possibility, at least, of failing in the contest with his co-defendant; in which case, the injunction would deprive him of a legal right, without affording him an equivalent or compensation.³

¹ *Dalton v. The Midland Railway Co.* 22 Eng. L. & Eq. 452.

² *Crawshay v. Thornton*, 2 M. & C. 1; *Stuart v. Welch*, 4 M. & C. 305; *Jew v. Wood*, Cr. & P. 185; *Adams' Eq.* 204-5.

³ *Crawshay v. Thornton*, ut supra; *Watts v. Hammond*, 25 Law Times R. 40.

§ 270. The plaintiff must likewise negative any interest in himself in the matter in controversy, and show that he is a mere stakeholder. It has been held, therefore, that if a deposit be made by a purchaser at an auction, and the auctioneer be afterwards sued for the deposit by the purchaser and vendor, he cannot sustain a bill of interpleader against them, if he claim to deduct from his deposit his commission and the duty.¹ The plaintiff must, in all cases, admit his liability for the entire amount of the claim.² The prayer of the bill should be, that the defendants may set forth their several titles, and may interplead, and settle and adjust their demands between themselves. The bill also generally prays an injunction to restrain the proceeding of the claimants, or either of them, at law; and whenever this is done, the bill should offer to bring the money into court; and it must be brought into court before the court will ordinarily act upon this part of the prayer.³ The injunction may be obtained *ex parte* immediately on the bill being filed, and stays proceedings both at law and in equity, but it stays them until further order only, and not, like the common injunction, till answer and further order.⁴

§ 271. If the defendants do not deny the statements of the bill, the ordinary decree is, that the defendants do interplead; and the plaintiff then withdraws from the suit. But the defendants, or either of them, are at liberty to contest and deny the allegations in the bill, or to set up distinct and independent facts in bar of the suit; and in such a case, the plaintiff must reply to the

¹ Mitchell v. Hayne, 2 S. & S. 63; Moore v. Usher, 7 Sim. 384; Begnold v. Audland, 11 Sim. 24.

² Bird v. Neff, 1 T. & H. Pr. 374.

³ Story's Eq. Pl. § 297; 3 Dan. Ch. Pr. 1760.

⁴ Adams' Eq. 205.

answer, and close the proofs in the usual manner, before he can bring the cause to a hearing between himself and the defendants; and at the hearing only can he insist (if such be his right) upon a decree, that the defendants do interplead.¹ Where the plaintiff has brought a bill of interpleader properly, and in good faith, as against both the defendants, he will be entitled to his costs both in equity and at law, (where he has been sued,) out of the fund: it is otherwise, where the bill is unnecessarily filed. And in the adjustment of the controversy between the defendants, the party whose claim is adjudged groundless, will be compelled to pay the costs, which have been taken in the first instance from the fund, to the rightful claimant of it; and he may also be decreed to pay the costs of the other defendant.²

¹ Story's Eq. Pl. § 297 a; 3 Dan. Ch. Pr. 1764.

² 3 Dan. Ch. Pr. 1766-7; Adams' Eq. 206.

CHAPTER XIV.

BILLS QUIA TIMET.

§ 272. ANOTHER class of cases in which courts possessed of general equity jurisdiction, grant relief concurrently with courts of law, is that of bills *quia timet*. A bill *quia timet* is in the nature of a writ of prevention to accomplish some object of precautionary justice. Bills of this sort are usually filed to prevent wrongs and anticipated mischiefs, and not merely to redress them when done. The jurisdiction to grant equitable relief by bill *quia timet* does not appear to have been granted to the courts of Pennsylvania, except where they are authorized to interfere by injunction, or the appointment of a receiver, as incidental to another branch of their chancery powers. They have authority however, by statute, to grant relief on petition, in many cases in which a bill *quia timet* might be sustained in a court of more general jurisdiction.

§ 273. Thus, if a trustee or assignee have neglected, when required by law, to file an inventory, or to give bond with surety, or to file an account of his trust, or be wasting, neglecting, or mismanaging the trust estate, or be in failing circumstances, or about to remove out of the jurisdiction, the court of common pleas having jurisdiction of the accounts of such trustee or assignee, may, on the petition of any person interested in the trust estate, issue a citation to such trustee or assignee, to appear and

show cause why he should not be dismissed from his trust. And on the return of the citation, the court may require such security, or further security, from such trustee or assignee, as they may think reasonable; or may proceed at once to dismiss such trustee or assignee from the trust. And the like proceedings may be had, whenever it is made to appear to such court, that any person who has become surety for any such trustee or assignee, in any bond given for the due execution of the trust, is in failing circumstances, or has removed out of the commonwealth, or signified his intention so to do.¹

§ 274. The like proceedings may be had in the proper orphans' court against an executor, administrator, or guardian, who is wasting or mismanaging the estate, or is like to prove insolvent, or has neglected to file a proper inventory, or a just account of such estate; and if in any such case, it be made to appear that the defendant is about to remove from the commonwealth, or that the property under his charge may be wasted or materially injured, before he can be reached by the ordinary process of the court, a writ of attachment may be forthwith awarded against him; on the return of which the court may proceed as in case of a citation. And these proceedings may be had upon the application of a surety of such executor, administrator, or guardian, in order to compel him to give counter-securities to indemnify such surety against loss. So also, where an executrix has married, or is about to marry another husband, she may be required to give security, or in default, her letters testamentary may be vacated.²

¹ Purd. Dig. 803; see Piper's Appeal, 8 Harris, 70.

² Purd. Dig. 215-17.

§ 275. Another instance of the application of this principle, occurs in the case of certain public officers who are required to give security for the faithful discharge of their official duties. Thus, if a justice of the peace have become, or be likely to become insolvent, or by reason of habits of intemperance be likely to increase the responsibilities of his sureties, the court of common pleas of the proper county may require him to give counter-security, to indemnify his original sureties against loss by reason of their suretyship.¹ And the sureties of a constable may have the same relief whenever it appears that, from habits of intemperance, or neglect of duty, such constable is unfit or incompetent to discharge his official duties.²

§ 276. By the ancient common law, there could, in general, be no future right of property created in personal goods and chattels, to take effect in expectancy; for they were considered to be of so transitory a nature, and so liable to be lost, destroyed, or otherwise impaired, that future interests in them were not, in law, treated as of any account.³ But yet, in last wills and testaments, such limitations of personal goods and chattels in remainder, after a bequest for life, were permitted; though originally that indulgence was only shown when merely the use of the goods, and not the goods themselves, was given to the first legatee; the property being supposed to continue all the time in the executor of the devisor: but now that distinction is disregarded; and therefore, if a man, either by deed or will, limit his books or furniture to A. for life, with remainder over to B., this remainder is good.⁴

§ 277. At law there was no remedy, in such cases,

¹ Ibid. 479.

² Ibid. 153.

³ 2 Story's Eq. § 844; 2 Bl. Com. 398.

⁴ 2 Bl. Com. 398.

whereby the legacy, whether of a specific chattel, or of a sum of money, could be secured to the person entitled in remainder; and therefore, courts of equity interposed to grant relief upon a bill *quia timet*, wherever there was any danger of loss, or deterioration, or injury to it, in the hands of the party entitled to the present possession. By our statute, "whenever personal property is bequeathed to any person for life, or for a term of years, or for any other limited period, or upon a condition or contingency, the executor of such will shall not be compelled to pay or deliver the property so bequeathed to the person so entitled, until security be given, in the orphans' court having jurisdiction of his accounts, in such sum and form, as in the judgment of such court shall sufficiently secure the interest of the person entitled in remainder, whenever the same shall accrue or vest in possession."¹ Legacies payable by a devisee, and charged upon his land, are within the spirit of the law, if the case be within its equity. The statute, however, was not designed to change or defeat the intention of the testator, but as a rule to interpret that intention, founded on the presumption that he would not have left the legacy in danger in the hands of the first legatee, if his mind had adverted to that point. A case not falling within the letter of the statute, cannot therefore be treated as within its equity, if it be most probable that the testator, had the question been presented to his mind, would have declared that the legacy should be paid without security.²

§ 278. Another instance, in which courts of equity interpose their remedial justice in the nature of a bill *quia timet*, is by injunction to prevent waste, or the destruction or deterioration of property, *pendente lite*, or to pre-

¹ Purd. Dig. 213.

² Fisher v. Redsecker, 7 Harris, 115.

vent irreparable mischief.¹ This class of cases will be considered when we come to treat on the subject of injunctions. It may however be observed, that in Pennsylvania the operation of the writ of estrepement, to stay waste, has been extended, by statute, to many cases in which it was not originally applicable, and that in practice it is essentially an equitable remedy. This writ lay, at the common law, after judgment obtained in an action real, as on a writ of right, before possession was delivered by the sheriff, to stop any waste, which the vanquished party might be tempted to commit in lands which were determined no longer to be his.² But for waste and destruction, committed by the defendant in the course of the suit, which a party knowing the weakness of his title, might, in the certain anticipation of a decision against him, feel inclined to attempt, an adequate remedy was still wanting. The statute of Gloucester, 6 Edw. I. ch. 13, therefore, gave the writ of estrepement, *pendente placito*; which is a continuing injunction upon the sheriff, to prevent waste at all times during the pendency of the suit, and gave him power, if he could not otherwise effect the object, to imprison the wasters, and if necessity required, to call to his aid the *posse comitatus*.³

¹ It is settled, that the working of *open* mines by a tenant for life, is not waste. *Neel v. Neel*, 7 Harris, 327. And a reversioner cannot have a writ of estrepement to restrain a tenant for life from working an open coal mine, although the work may be prosecuted by aid of railroads, engines, and other such modern appliances, so as to render it probable that the mine will be exhausted during the continuance of the life estate. *Irvine v. Covode*, 3 Pittsburgh Leg. J. 26.

² *Jones v. Whitehead*, 1 Pars. 306; *Brown v. O'Brien*, 4 Penn. L. J. 457-8; 2 Inst. 328.

³ *Brown v. O'Brien*, 4 Penn. L. J. 458; *Jones v. Whitehead*, 1 Pars. 306. This statute, by the report of the judges of the supreme court, in 1808, is in force in Pennsylvania.

§ 279. The writ of estrepement may issue, by statute, in Pennsylvania, at the instance of a plaintiff in ejectment, or *scire facias* on a mortgage; of a lessor, after notice to quit; of a judgment creditor, after lands have been levied on and condemned, or are liable to be sold on execution; of a purchaser at sheriff's sale; of a remainder-man against tenant for life; of the creditors of a decedent's estate;¹ and of the plaintiff in a foreign attachment who has attached the interest of a mortgagee or judgment creditor.² And in all such cases, the tenant or party in possession may apply to the court from which the writ issued, who may hear the parties in a summary manner, and may dissolve the writ, or make such further order therein as to them may seem just and right.³ If faithfully executed, the remedy by estrepement seems to be ample; for, if the parties in possession commit waste, after service of the writ, they may be committed to prison for their contempt. The sheriff may rouse the *posse comitatus* to resist or restrain those who commit the waste, and it has been said that he may likewise imprison offenders, if he be put to it; and he may make a warrant to others to do it.⁴

¹ Purd. Dig. 836-7.

² Act 8 May 1855, § 4. P. L. 532.

³ Purd. Dig. 836-7.

⁴ Jones v. Whitehead, 1 Pars. 306-7; 2 Inst. 329.

CHAPTER XV.

INJUNCTIONS.

§ 280. THERE still remains to be considered one of the most important heads of the concurrent jurisdiction of courts of equity; that of injunctions. An injunction is a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience. By various acts of assembly, the courts, before enumerated,¹ are invested with the power and jurisdiction of courts of chancery, so far as relates to "the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community, or the rights of individuals."² It will be seen that these statutes by no means confer a general equity jurisdiction upon the courts in injunction causes; it is restricted to the prevention or restraint of the commission or continuance of acts *contrary to law*; that the act complained of is contrary to equity is not sufficient to found the jurisdiction. Injunctions on equitable grounds are grantable only where they are incidental to the relief prayed for, and that relief is within some other head of equi-

¹ Ante, § 35. The jurisdiction of the supreme court in injunction cases extends throughout the state. Purd. Dig. 308.

² Purd. Dig. 305-7.

table jurisdiction,¹ such as fraud, accident, mistake, or account.²

§ 281. Injunctions are of two kinds; the remedial writ, which operates as a restraint upon the party in the exercise of his real or supposed rights; and the judicial writ, which issues subsequent to a decree; it is a direction to yield up, to quiet, or to continue the possession of lands, and is properly described as being in the nature of an execution.³ The object of this process, which is most extensively used in equity proceedings, is generally preventive and protective, rather than restorative; although it is by no means confined to the former. It seeks to prevent a meditated wrong more often than to redress an injury already done. It is not confined to cases falling within the exercise of the concurrent jurisdiction of the court; but it equally applies to cases belonging to its exclusive and to its auxiliary jurisdiction.⁴ The cases here treated of are, however, those in which there is a special prayer for this process and relief, and which are hence denominated injunction bills.⁵

§ 282. It is obviously impracticable to enumerate the various cases in which our courts may interfere by the writ of injunction. The object of the statute was to furnish adequate redress in cases where, although an action at law was maintainable, yet the injury might be irreparable, and it was necessary to justice to step in and prevent its being committed, by a summary process.

¹ *Gilder v. Merwin*, 6 Wh. 541; *Hagner v. Heyberger*, 7 W. & S. 106-7; *Com. v. Rush*, 2 Harris, 193.

² *Riley v. Ellmaker*, 6 Wh. 545. The equity powers of the courts of Pennsylvania do not extend to restraining an equitable tenant for life from waste. *Woodman v. Good*, 6 W. & S. 173.

³ *Eden on Injunctions*, 10-13.

⁴ 2 *Story's Eq.* § 862; *Jeremy's Eq.* 308.

⁵ *Ibid.*

Thus, if there were sufficient ground to believe, in consequence of threats or otherwise, that an individual was about committing waste in timber, &c.; or that a corporation was grossly abusing its privileges; or that a public officer, municipal or otherwise, was destroying or about to destroy public books and papers, or materially injure the public interests, or embezzle or waste the public moneys or properties; or, in short, any act was doing, or likely to be done, for which damages could not, perhaps, compensate, and the legal redress might be too tardy and ineffectual; which was in the nature of misfeasance, nuisance, waste, spoil, or destruction to property; and the act was contrary to law, and injurious to the community or individuals; a summary remedy is given by the strong arm of an injunction to stop it, or prevent its being done.¹

§ 283. In courts of general equity jurisdiction, injunctions are constantly granted to stay proceedings at law. But under our restricted equity powers, it is obvious, that such a bill can seldom be sustained; for however inequitable, under the particular circumstances of the case, it cannot be *contrary to law*, for a party to pursue his legal remedy; and therefore, except as incidental to some other head of equitable relief, as fraud,² accident, or mistake, or where a discovery is necessary to a just determination of the issues at law, our courts have no jurisdiction to enjoin proceedings before a legal tribunal. And there is the less occasion for the exercise of such a jurisdiction in Pennsylvania, where a defendant has, from the earliest period, been permitted to plead an equitable defence at law; and where, if judgment have been entered, on making out a case entitled to relief, the

¹ Hagner v. Heyberger, 7 W. & S. 107.

² Holl v. Holl, 4 Am. L. J. 224.

courts have power to open the judgment and let the defendant into a defence, or to direct an issue to try the right of the party to such equitable relief. An injunction, however, has been granted to restrain the creditor of a lunatic from levying an execution upon his personal property in the hands of the committee; for such act is contrary to law.¹

§ 284. Injunctions to restrain suits at law are usually spoken of as common or special. The common injunction is issued upon and for the default of the defendant, in not appearing to, or answering the bill; or where the defendant obtains further time to answer, or a commission to take his answer.² Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed by the rules of court, the plaintiff is entitled, as of course, upon motion and notice, to such injunction.³ No affidavit is necessary to obtain such injunction, unless the defendant be abroad; and the reason is obvious—the defendant himself can at any moment dissolve the injunction by filing his answer. Our courts have adopted the practice, without putting the party to his writ, of continuing a cause during the pendency of a bill of discovery unanswered.⁴ Injunctions granted upon other occasions, or involving other directions, are called special injunctions.

§ 285. Injunctions to restrain the alienation of property *pendente lite*, are another instance, of the equitable relief which may be obtained by means of this writ.

¹ Eckstein's Estate, 1 Pars. 59; Wright's Appeal, 8 Barr, 57.

² 2 Story's Eq. § 892.

³ Equity Rules, liii. p. 130.

⁴ M'Canles v. Coolbaugh, 1 T. & H. Pr. 84.

In regard to negotiable securities, as by their being transferred to a *bonâ fide* holder without notice, the latter may be entitled to recover upon them notwithstanding any fraud in their original concoction, or the loss of them by the real owner; it is often indispensable to the security of the party, against whose rights they may be thus made available, to obtain an injunction prohibiting any such transfer.¹ So an injunction will be granted, to restrain a party from conveying the legal title to real estate, pending a suit for specific performance. For although such transfer cannot affect the rights of the parties, yet the plaintiff may be put to the expense and delay occasioned by the necessity of filing a supplemental bill, to make the alienee a party to the proceeding.²

§ 286. We will now proceed to the consideration of injunctions to restrain waste. No principle of law is better settled, than that a court of chancery will interpose by injunction to restrain such persons, as tenants and others, from committing waste, having but a limited interest in, or possession of property, when the acts about to be done will work a lasting injury to the inheritance, nor do the courts restrict their power of granting injunctions to that species of waste which goes merely to the destruction of the freehold, or a part of it; nor is it confined to that species of waste which is sometimes called a lasting injury to the inheritance, as by cutting down timber, or other trees growing upon the land, or the destruction of buildings, or a direct injury to them; but it seems to be extended to all those kinds of waste or injury to the inheritance, which deteriorate the land when used for agricultural purposes; especially when carried to such an extent as will mate-

¹ 2 Story's Eq. § 906.

² Ibid. § 908.

rially injure the rights of the landlord or reversioner when coming into the possession; so that the property cannot be well appropriated to those purposes for which it was originally intended, when he parted with the possession. The doctrine seems to be, that the tenant is bound by law, when he rents, to farm the land in an honest and husbandlike manner, according to the custom of the country where the land is situated. And if the tenant attempt to divert the land from the usual course of husbandry, in such a way as materially to injure the same, a court of equity will restrain him by injunction from committing waste of this description.¹

§ 287. Thus a tenant, who has leased property for farming purposes, will be restrained by injunction from removing from the premises the manure made upon the farm. Good husbandry requires that the tenant should leave the manure upon the premises; in the absence of any stipulation in the lease to the contrary, the law implies that the tenant consented that it should be left, and in their agreement the legal implication is, that the parties treated it as real estate, and the right of its removal is as much forbidden by law as that of any other fixture.² The current of the American authorities certainly establishes the rule, that where no reservation is made in the lease, the manure made on the farm belongs to the land, and cannot be severed from it.³ But unless the acts complained of are contrary to law, as we have already seen, the courts cannot interfere by injunction; thus, they cannot restrain the commission of acts which only amount to equitable waste, nor can they restrain waste by an equitable tenant for life.⁴

¹ *Jones v. Whitehead*, 1 Pars. 307, 309.

² *Barrington v. Justice*, 4 Penn. L. J. 295; *Lewis v. Jones*, 5 Harris, 262.

³ *Waln v. O'Connor*, 9 Leg. Int. 67. ⁴ *Woodman v. Good*, 6 W. & S. 173.

§ 288. Let us, in the next place, consider the granting of injunctions in cases of nuisance. Nuisances are of two kinds; public nuisances, or such as are injurious to the public at large; and private nuisances, or such as injuriously affect the rights and interests of private persons. The jurisdiction of courts of equity, in cases of purpresture and nuisance, though not frequently exercised, seems undoubted. It is said to be founded on the right to restrain the exercise or the creation of that, from which irreparable damage to individuals, or great public injury, must necessarily ensue. By purpresture is meant an encroachment upon the king, either upon part of his demesne lands, or upon rights and easements held by the crown for the public, such as highways, public rivers, forts, streets, squares, bridges, quays, and other public accommodations. A purpresture may exist, without being an actual general public nuisance, although it may be both. And of this nature seem to be all permanent encroachments on, and occupations of any part of a public street, by an owner of land bounding thereon. Besides the ordinary remedy by indictment, an information lies in equity to redress the grievance by way of injunction.¹

§ 289. A court of equity will interfere in cases of nuisance, not only on the information of the attorney-general, but also upon the application of private parties directly affected by the nuisance. When private individuals suffer an injury, quite distinct from that of the public, in consequence of a public nuisance, they will be entitled to an injunction and relief in equity; and this, not because the act complained of is a nuisance, but on account of the irremediable injury to their private

¹ Commissioners v. Long, 1 Pars. 145; Biddle v. Ash, 2 Ash. 220.

rights of property.¹ As a general rule, the court will not interfere finally, where a doubt exists as to the character and illegality of the act complained of, until both have been ascertained by a trial;² but where the right is clear, and the threatened injury irreparable, an injunction will be awarded, although the right have not been established at law.³

§ 290. Courts of equity will enjoin an individual from carrying on an offensive trade, when from its locality it is injurious to the health or comfort of those residing in its immediate vicinity. To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighbourhood; it is sufficient if it produce that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. If a slaughter house have been erected in a remote part of a city, but as the city extends, the vacant grounds are occupied by the erection of valuable buildings for residence, the continuance of such a business there is a nuisance which may be restrained by injunction.⁴

§ 291. In regard to private nuisances, the interference of courts of equity by way of injunction, is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits.⁵ That a court of equity will interfere, and by injunction, pro-

¹ *Commissioners v. Long*, 1 Pars. 148; *Smith v. Cummings*, 2 Pars. 97; *City of Georgetown v. The Alexandria Canal Co.*, 12 Peters, 98-9; *Attorney-General v. The Sheffield Gas Consumers' Co.*, 19 Eng. L. & Eq. 639; *Whitfield v. Rogers*, 3 Am. L. R. 47.

² *Commissioners v. Long*, 1 Pars. 146; *Attorney-General v. Cleaver*, 18 Ves. 218; *Borough of Frankfort v. Lennig*, 1 Am. L. R. 358; *Ramsey v. Riddle*, 1 Cr. C. C. 399.

³ *Com. v. Rush*, 2 Harris, 195; *Smith v. Cummings*, 2 Pars. 102.

⁴ *Smith v. Cummings*, 2 Pars. 92.

⁵ 2 Story's Eq. § 925.

tect the clear rights of a suitor, derived either from contract or ancient possession, against a nuisance produced by the erection of a building by his neighbour, which darkens his windows, or destroys his right of way, is undoubted. Such an injury being continuous, operates to diminish the comfort and use of property, and the remedy by a multiplicity of actions, for the continuance of it, would furnish no substantial protection. But a clear right in the complainant must be shown before an injunction can be awarded.¹

§ 292. At the old common law, and before chancery had made its modern strides towards general civil jurisdiction, the remedy for a party in such cases would have been an assize of nuisance. The modern remedy for such a tort is an action on the case. But the superior promptness of, and vigour of the action of equity, has given rise to the modern procedure in that court by bill. In all their various forms, however, these remedies are local in their character, and chancery can no more enjoin against a nuisance out of the jurisdiction of the court, than an assize or action on the case could be brought out of the county where the land lies. Broad as is the language of the text writers, and even of the courts, in regard to the position, that equity having possession of the person of the wrong-doer, acts without regard to the local origin of the tort; it is nevertheless true that proceedings in chancery are, like proceedings in all other judicial tribunals, sometimes local, and sometimes transitory. The jurisdiction of a court of chancery is sustainable in a case of fraud, trust, or contract, wherever the person be found, although lands not within the jurisdiction of the court may be affected by the decree; but to justify the juris-

¹ *Biddle v. Ash*, 2 *Ash*, 221.

diction in cases touching lands in foreign countries, the relief sought for must be of such a nature as the court is capable of administering in the given case. The remedies in equity, in cases of private nuisances, to be co-extensive with the wrong, must have a triple aspect. They must include the restraint and prevention of a contemplated nuisance; the removal of such a nuisance, when perpetrated before the action of the court has been invoked; and compensation in damages for injuries resulting from such nuisance, where restraint and removal fall short of doing entire justice to the party aggrieved. To this extent fully has the action of courts of equity gone, in cases of private nuisances. And the reason chancery will not exercise extra-territorial jurisdiction in cases of nuisance, is because it lacks the powers to carry its decree into execution. It cannot send a writ of assistance into another jurisdiction to prostrate the alleged nuisance, neither can it award an issue to the place where the nuisance exists, to inquire into the damages sustained by its perpetration and continuance.¹

§ 293. To justify the court in granting an injunction to restrain a party in his acts, the injury must be shown to be such, as from its nature is not susceptible of being adequately compensated by damages at law; or by a continuation of the same, a permanent injury would ensue, or occasion a constantly recurring grievance, which could only be prevented by an injunction. The mere diminution of the value of property by the nuisance, without irreparable mischief, will not furnish sufficient ground for equitable relief. On the other hand, where a court of equity sees that the injury might be irreparable, by the loss of health, loss of trade, or a destruction of the means

¹ *Morris v. Remington*, 1 Pars. 387-98.

of living might ensue from erecting a building, its jurisdiction would be exercised for preventing the injury. Thus, if a party should build so near the house of another, as to darken his windows, against the clear rights of the latter, either established by contract or ancient possession, courts of equity will interfere by injunction to prevent the nuisance, as well as to remedy it, if already done, although an action for damages would lie at law; and for this reason, that in many cases the damages would in no just sense be deemed an adequate relief in the case.¹

§ 294. Restrictions and limitations imposed by grantors of land on their grantees, are always made with regard to the usefulness, comfort, and consequent value of conterminous property; and are often vital to its enjoyment. Common law remedies, *in personam*, for breaches of such agreements, against the immediate party who builds in defiance of restriction, are but feeble means of preventing such injuries. The prompt and vigorous action of an injunction, operating on all who, as agent or principal, are engaged in violating the restriction, is not only the best, but almost the only remedy worthy of being called such, within the command of the judicial authority. Hence injunctions, in the nature of specific performance to restrain the violation of covenants, are among the most common, as well as the most valuable means employed by courts of equity, to make men do what conscience ought to lead them to—perform their contracts specifically according to the terms thereof. Thus, in *Barrett v. Blagrove*,² the proprietors of Vauxhall Gardens demised a contiguous property, under an express

¹ *Sutcliff v. Isaacs*, 1 Pars. 496-7; *Whitfield v. Rogers*, 3 Am. L. R. 44.

² 5 Ves. Jr. 55.

covenant that the tenant should not carry on the trade of a victualler, retailer of wine, and other trades therein named. The lessee made an under-lease to Blagrove, the defendant, who became insane, but his wife kept the house open for public entertainment, during the season for Vauxhall Gardens. On a bill filed, praying for an injunction to restrain the defendants from carrying on this business there, Lord Chancellor Eldon declared, that it was "in the nature of a specific performance;" and granted the injunction. In *Franklin v. Tuton*,¹ the defendant, a lessee of certain building ground, covenanted that the house to be built should correspond with the house already built, in elevation. The bill was to compel the defendant, who had not conformed to the covenant, to alter accordingly; and Sir Thomas Leech, vice-chancellor, so decreed. In *Hills v. Miller*,² the chancellor decided that the grantee of such easement is entitled to an injunction, to restrain the owner of the servient tenement from erecting buildings thereon, in violation of his covenant.³

§ 295. It is upon similar grounds that courts of equity interfere in cases of trespass, that is to say, to prevent irreparable mischief, and to suppress multiplicity of suits. For if the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Thus, a railroad company will be enjoined from entering upon private property for the purpose of constructing their road, until compensation shall have been made to the owner.⁴ That the complainant

¹ 5 Madd. 469.

² 3 Paige, 254.

³ *Scott v. Burton*, 2 Ash. 325. In *Watertown v. Cowen*, 4 Paige, 510, the same principles are asserted and carried out.

⁴ *Jarden v. The Philadelphia, Wilmington and Baltimore Railroad Co.*, 3

may recover damages at law, is no answer to the application for an injunction against the permanent appropriation of his property for the road, under a claim of right; this is deemed an irreparable injury, for which the law can give no adequate remedy, or none equal to that which is given in equity, and is an acknowledged ground for its interference. Trespass is destruction, in the eye of equity; when there is no privity of estate, it prevents its repetition or continuance, protects the right, arrests the injury, and prevents the wrong; this is a more beneficial remedy than the law can give, and therefore the proper one for a court of equity to administer.¹ So also, a court of equity will grant an injunction to restrain a builder from using his neighbour's party wall, before payment of a moiety of the cost thereof;² or from constructing a party wall on the land of another, without having the boundaries duly regulated.³

296. Courts of equity interfere, on like principles, to restrain violations of patents and of copyrights; but as these are matters within the exclusive jurisdiction of the federal courts, they are foreign to the purpose of this

Wh. 502. When railway companies or individuals exceed their statutory powers in dealing with other people's property, no question of damage is raised where an injunction is applied for; but simply one of the invasion of a right. Railway companies must stand upon a strict construction of their chartered privileges. *Pennsylvania Railroad Co. v. Canal Com.*, 9 Harris, 22. If they step one inch beyond them to the prejudice of others or of their stockholders, or offer to do any act without the prescribed preliminary steps, they are liable to be enjoined irrespective of the amount of damage. *Com. v. Pittsburgh and Connelville R. R. Co.*, Sup. Court, 12 March 1855. MS.

¹ *Bonaparte v. The Camden and Amboy Railroad Co.*, 1 Bald. 233. But an injunction will not be granted against public officers, acting under the authority of the state, to restrain them from taking private property for a public improvement, until suitable compensation shall be made, where a mode is provided by law for the assessment of the damage sustained. *Heston v. Canal Commissioners*, Bright. R. 183.

² *Cox v. Willetts*, 2 Am. L. J. 327.

³ *Sutcliff v. Isaacs*, 1 Pars. 497.

work. There is, however, a subject of a kindred nature which it will here be proper to consider, namely, cases of injunctions to restrain the fraudulent use of another's trade marks. Where a manufacturer adopts a certain trade mark, and stamps it upon the articles manufactured, he is entitled to the exclusive use of it, and a court of equity will restrain, by injunction, any other person who pirates such trade mark from using it.¹ On such a bill, the question is not whether the complainant was the original inventor of the mark alleged to have been pirated, nor whether the article sold under the pirated mark is of equal value with the genuine; but the ground is, that the complainant has an interest in the good will of his trade or business, and having taken a particular label or sign, indicating that the article sold under it was made by him, and sold under his authority, or that he carries on business at a particular place; he is entitled to protection against one who attempts to pirate upon the good will of his friends or customers, by using such label or sign, without his consent or authority.²

§ 297. Where the mark, used by the defendant, resembles the plaintiff's mark so closely as to be calculated to deceive, and to induce persons to believe the defendant's goods to be the plaintiff's manufacture, and the defendant uses such mark with intent to deceive, an injunction will be granted. In every such case the court must ascertain whether the differences were made *bonâ fide* in order to distinguish the one article from the other, whether the resemblances and differences were such as naturally arose from the necessity of the case, or

¹ Taylor v. Carpenter, 11 Paige, 292.

² Partridge v. Menck, 2 Sand. Ch. 622; Davis v. Kendall, 2 Rhode Island, 566; s. c. 2 Am. L. R. 681; 3 Danl. Ch. Pr. 1870.

whether, on the other hand, the differences were simply colourable, and the resemblances were such as were obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance of primary importance for the court to consider, because it will almost invariably be found, that there was no reason for the resemblance, except for the purpose of misleading.¹ The court, or a jury, would, in such a case, be bound to presume, that it is not a fortuitous concurrence of events which has produced the similarity; it would be irrational not to rest convinced that such coincidence is the result of design; and the object of that design could only be that the manufacture of the defendant might pass, in the eyes of beholders, for the particular manufacture of the plaintiff.²

§ 298. It is to be observed, however, that a court of equity will not, in a contest between persons who profess to be manufacturers of *quack* medicines, interfere to protect the use of trade marks, by injunction.³ A complainant, whose business is imposition, cannot invoke the aid of equity against a piracy of his trade mark. The only remedy in such a case is at law.⁴ So, if the plaintiff have falsely made the word "patented" a part of his trade mark, when, in truth there never was a patent for the article, he will not be protected in the use of it. By using this appellation, he misleads the public; every body knows that patented articles are dearer, and therefore, purchasers are more readily inclined to give a higher price for a patented article than if it were open to unre-

¹ Taylor v. Taylor, 23 Eng. L. & Eq. 282.

² Edleston v. Vick, Ibid. 54.

³ Fowle v. Spear, 7 Penn. L. J. 176.

⁴ Pidding v. How, 8 Sim. 477.

stricted competition.¹ But if the article have once been patented, it matters not that the patent has expired; if the designation were originally accurate, the party will be protected in the use of his trade mark. It would be hard if, when a patentee had by his exertions made his patent article, and the label by which it was recognised, to be well known in trade, the whole public were, on the expiration of the patent, not only to make and sell his invention under the name which he had given it, but also to use his label. The public or purchasers may have confidence in the original maker of the patented article, as having acquired a greater skill than others in the manufacture of it, and, recognising the label, prefer the article so labelled, as believing it to come from him.²

§ 299. Courts of equity will, upon similar grounds, restrain a party, by injunction, from the disclosure of secrets, communicated to him in the course of a confidential employment. There is no doubt whatever, that where a party who has a secret in a trade employs persons, under contract express or implied, or under duty express or implied, those persons cannot gain the knowledge of that secret, and then set it up against their employer; and therefore, a party was restrained, by injunction, from using the secret of compounding a medicine not protected by patent, it appearing that the secret was imparted to him, to his knowledge, in breach of faith or contract.³

§ 300. There are many other cases in which courts of equity will grant relief by a special injunction. Thus, a turnpike-road company will be protected, by injunc-

¹ *Flavell v. Harrison*, 19 Eng. L. & Eq. 17.

² *Edleston v. Vick*, 23 Eng. L. & Eq. 55.

³ *Morison v. Moat*, 6 Eng. L. & Eq. 14; s. c. 9 Eng. L. & Eq. 182; 3 Dan. Ch. Pr. 1870.

tion, against a continued invasion of its franchises, as where a by-road is made to enable travellers on its road to avoid the toll-gate.¹ So an injunction may be granted to restrain a partner from exercising a control over partnership property, where the interests of a deceased partner require it;² to restrain the removal of a body from a common burial ground, against the consent of the relatives of the deceased;³ and to restrain a banking company from paying out money which had been deposited with them by the plaintiff, and to which the plaintiff had a priority over the stockholders.⁴

§ 301. Injunctions will also be granted to compel the due observance of personal covenants, where there is no effectual remedy at law. Thus, where a celebrated cantatrice had covenanted to sing and perform at the plaintiff's theatre, for a specified period, and that, during her engagement with the plaintiff, she would not sing elsewhere, without his license in writing; the court granted an injunction to restrain her from singing elsewhere than at the plaintiff's theatre during the period specified.⁵ So a vendor, who has sold his place of business and the good-will of his trade, and covenanted not to carry on the trade within certain defined limits, will be restrained, by injunction, from so doing.⁶ And in such case, it is not necessary that the defendant should have a place of business within the prohibited places; he will be restrained from soliciting orders within the restricted limits, although his place of business may be elsewhere.⁷

¹ Turnpike Road Co. v. Briedenthal, 1 Wh. Dig. 727, § 249.

² Holden v. M'Makin, 1 Pars. 284.

³ In re Stephen Girard, 4 Am. L. J. 101.

⁴ Com. v. Bank of Pennsylvania, 3 W. & S. 184.

⁵ Lumley v. Wagner, 13 Eng. L. & Eq. 252.

⁶ Palmer v. Graham, 1 Pars. 476.

⁷ Turner v. Evans, 21 Eng. L. & Eq. 598; s. c. 22 Eng. L. & Eq. 144.

§ 302. In regard to public functionaries, the rule is, that so long as they confine themselves within the exercise of those duties which are confided to them by law, a court of equity will not interfere. The court will not interfere to see whether any regulation or alteration which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, the court no longer considers them acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing without legal authority. And the rule seems to be clear, that in all cases of incorporate bodies, such as canal or railroad companies, courts of chancery do not interfere, while they act clearly within the authority the law gives them, and it is only when they transcend those legal limits, that they are amenable to a court of equity by way of injunction.¹

§ 303. The granting or refusing of an injunction is a matter resting in the sound discretion of the court; and it is never awarded except where the plaintiff shows a clear equity entitling him to its aid and relief. A preliminary injunction is emphatically the strong arm of the court, and is never awarded except

¹ *Hill v. The Commissioners*, 1 Pars. 510; *Frewin v. Lewis*, 4 M. & C. 254. In *Benton v. Stewart*, an application was made to the court of common pleas of Philadelphia county, for an injunction to restrain the defendants from extending a wharf into the river Delaware, in pursuance of a permit granted by the board of wardens, which, it was alleged, would inflict great injury on the complainant; but the court refused the motion, saying that, so long as the wardens, in the exercise of their discretion, inflicted upon holders of wharf property no wanton or unnecessary damage, and did no act contrary to law, or injurious to the public interests, the court had no power to interfere with their action by way of injunction. 28 October 1854. MS.

in clear cases of right, and where no doubt exists as to the claim of the plaintiff to the remedy he invokes.¹ A doubt, however, about the *legal* rights of the parties, would be no reason for deciding either one way or the other on a motion for an injunction. On a question of mere law the courts are bound to have an opinion, whatever may be the difficulty of making it up.² But not so where the contest relates to a matter of fact. There to be in doubt, is to be resolved. The party on whom the burden of proof lies gains nothing, if he do no more than balance the case; for the presumption of law is in the scale of his adversary, and throws the preponderance against him. And there are some subjects of judicial investigation in which even common probabilities will not be weighed—where every fact is taken not to exist, unless it be made so manifest that it cannot be seriously contradicted. By this latter rule a chancellor judges of the evidence on which he is asked to issue an injunction: he must not strike in the dark, nor act at all, when there is any reason to fear that he may do a wrong.³ A refusal to award such a preliminary act in no respect decides the controversy, it is the simple assertion on the part of the court, that the case is not one which requires it to move until the cause is ripe for final adjudication.⁴

§ 304. In awarding an injunction, a very delicate and highly responsible power is used, which ought not to be exerted when there is reasonable doubt as to the exis-

¹ *Waring v. Cram*, 1 Pars. 526; *Langolf v. Seiberlitch*, 2 Pars. 71.

² This is the doctrine held by the supreme court; but it seems, that a court of common pleas is not bound to decide doubtful and difficult questions of law, on a motion for injunction. *Hill v. The Commissioners*, 1 Pars. 509.

³ *The Lehigh Coal and Navigation Co. v. The Lehigh Valley Railroad Co.*, Supreme Court, 16 May 1854, per Black, C. J. MS.

⁴ *Langolf v. Seiberlitch*, 2 Pars. 71.

tence of any fact on which the application is founded. If there appear, from the affidavits of the parties or witnesses, such a repugnancy in point of fact as makes it necessary to decide on the relative truth of their conflicting statements, or the credibility of the affirmants, no prudent judge will undertake so dangerous an inquiry in the first stage of the cause. Great latitude is allowed in order to present the application with all its attendant circumstances operating in favour of or against it, though the range may be wider than the bill. It depends on the matters of fact or law, which appear to be contested, whether the chancellor will examine the whole case involving the respective rights of the parties. The great object is to look for that full information which will lead his mind to a certainty as to all material facts, for doubt or uncertainty is fatal to the motion to grant the injunction, though it is a good cause for continuing it on a motion to dissolve; the burden of proof being on the plaintiff in the one case, and on the defendant in the other. On the other hand, if the bill or affidavit state any facts not denied in the affidavits on the part of the defendant, or the plaintiff by counter-affidavits do not deny the statement of the defendant, such facts are assumed as a safe basis for a decision on the motion, though they may be open to inquiry at a subsequent state of the cause; and the matters of law involved in the motion will be considered with reference thereto.¹

§ 305. The reason on which any action is declined, when there is an issue of fact between the parties or their affirmant, is obvious. By granting the injunction, positive credence is given to the affidavits on the part of the plaintiff, and those of the defendant are repudiated

¹ Cooper v. Mattheys, 5 Penn. L. J. 40-1.

directly, whereas, by refusing the injunction nothing more is done or intended than a decision that the fact is so doubtful, as not to be safe to act on the assumption of its truth, thus leaving it entirely open to future investigation. It must be obvious too, that in applying for an injunction, the plaintiff seeks either to interrupt the course of the common law, or to ask some relief which he cannot have at law; he must consequently state and make out a case for equitable relief, on such facts as bring his case within the jurisdiction of courts of equity, and proper for its exercise. Hence, if he fail to satisfy the conscience of the chancellor affirmatively, he has no case before him; for doubt or uncertainty as to facts, is of the same effect, on a motion, as their non-existence.¹

§ 306. Again, a court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call this court into action but conscience, good faith, and diligence: when these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced. A court of equity frequently refuses an injunction, where it acknowledges a right, when the conduct of the party has led to a state of things which occasions the application, and therefore will refuse or dissolve an injunction without saying in whom the right is. An injunction will not be granted to restrain a party, who has been in possession any length of time, claiming by a title adverse, till the right is first settled at law: a plaintiff, who states such a case, puts himself out of court. It is a proper remedy to protect a possession till it appear to be against right,

¹ Ibid. 41.

but is never used to disturb a possession under claim and colour of right. The rule on which courts of equity act by an injunction, in the first instance, is to leave the parties in the same position as it finds them when the application for relief is made, by protecting the plaintiff in the same possession which he had before enjoyed, and when the possession of the defendant has been unmo-
lested, leaving the right of possession to be settled at law. No cases come before courts of equity, in which a greater degree of diligence is required, than applications for injunctions: their nature and effect are such as to produce the most irreparable injury when they are improvidently granted.¹

§ 307. Where the application is for an injunction upon affidavit, before answer, upon the ground of apprehended irreparable injury, the court will hear counter-affidavits until satisfied with the information offered; and the course is the same where the application is to dissolve an injunction before answer. But if the defendant have filed his answer, then it is a general rule that no affidavit can be read to contradict it; for where the answer is full and denies all the circumstances upon which the equity is founded, it has become the universal practice, with reference to an injunction, to give credit to the answer. The plaintiff is strictly tied down to reading the answer in support of his case, whether the motion be for an injunction, or, upon the merits, against dissolving a common injunction.² And the answer, in such case, has been held to maintain its ground, even where an indictment for perjury, upon the answer, had been found by

¹ Ibid. 44-5.

² *Lessig v. Langton*, Bright. R. 193-4; *Com. v. Bank of Pennsylvania*, 3 W. & S. 199; *Carpenter v. Burden*, 2 Pars. 27; *Holl v. Holl*, 4 Am. L. J. 225.

the grand jury, and the injunction held not to be thereby revived, or the ground sufficient to warrant the court in making an order to revive it.¹

§ 308. The exceptions to this rule seem to be cases of waste, or the infringement of patents; and some other cases, such as fraud; and after considerable hesitation, the exception was extended to cases of partnership, where in principle these are analogous to waste. But this is admitted with great caution, and the reading of affidavits is only permitted when it is made clearly to appear, that one partner, by acts of extreme misconduct, is bringing the subject of the partnership within the principle of irreparable mischief, and so making the case analogous to waste. They are permissible in refutation of the defendant's answer, only to show fraud, mismanagement or improper conduct in the acting partner, or to show actual or threatened waste; but never to show title in the plaintiff, or the fact of partnership denied.² But an answer filed after the plaintiff has served his notice of a motion for a special injunction, can only be used as an affidavit in opposition to those used by the plaintiff, and the defendant cannot insist, that under such circumstances, the plaintiff is confined in his application to the equity confessed in the answer.³

§ 309. Special injunctions are grantable only upon due notice to the other party, by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party do not appear at the time and place ordered.⁴ And when awarded, the writ of in-

¹ Clapham *v.* White, 8 Ves. 35; Com. *v.* Bank of Pennsylvania, 3 W. & S. 199.

² Lessig *v.* Langton, Bright. R. 194; Com. *c.* Bank of Pennsylvania, 3 W. & S. 199; and cases there cited. Cases of nuisance form another exception to the rule. Smith *v.* Cummings, 2 Pars. 96.

³ Waring *v.* Cram, 1 Pars. 525; Lessig *v.* Langton, Bright. R. 193.

⁴ Equity Rules, liii. p. 130-1.

junction cannot actually issue, (except where the commonwealth is plaintiff,) until the party applying for the same have given bond, with sufficient sureties, to be approved by the court or judge, conditioned to indemnify the other party for all damages that may be sustained by reason of such injunction.¹ This rule applies to injunctions to stay proceedings at law.² And the courts of the city and county of Philadelphia are interdicted, by statute, from granting or continuing injunctions against the erection or use of any public works of any kind, erected or in progress of erection, under the authority of an act of the legislature, until the question of title and damages be finally decided at law.³

§ 310. The form of granting injunctions at present used, and which was established by Lord Eldon, is "till answer *or* further order." This has been adopted as giving the defendant the liberty to move, if necessary, to dissolve the injunction before answer filed, upon an affidavit denying the equity of the bill.⁴ An application to dissolve, must be by a special motion, whether before or after answer filed, the rule being that an injunction cannot be dissolved, unless upon motion in open court.⁵ Of such application a previous reasonable notice must be given, to allow the complainant to take affidavits in support of his bill.⁶ When the application to dissolve an injunction is made before answer, it must be supported by affidavits on the part of the defendant in answer to those upon which the injunction was obtained, and the case thus made by the defendant, may be met by coun-

¹ Purd. Dig. 308. ² Holl v. Holl, 4 Am. L. J. 224. ³ Purd. Dig. 308.

⁴ 3 Dan. Ch. Pr. 1894; Read v. Consequa, 4 W. C. C. 178; Holl v. Holl, 4 Am. L. J. 224.

⁵ 3 Dan. Ch. Pr. 1895.

⁶ Wilkins v. Jordan, 3 W. C. C. 226.

ter-affidavits on the part of the plaintiff, and upon hearing the motion, the court will judge between them.¹ The defendant may also, before answer, move to dissolve the injunction on the ground of want of equity in the bill.² If the defendant do not succeed in satisfying the court, that the injunction ought either to have been refused, or that it ought not to be continued, it will direct it to be continued until the hearing.³

§ 311. An injunction is never made perpetual but upon the hearing of the cause; when however it is once made perpetual, it seems to be so far final as to remain in force notwithstanding the death of the party; for if it were necessary to revive upon every abatement, that would be, in effect, a perpetual suit. It may be mentioned here, that if an injunction have been obtained upon an interlocutory order, care must be taken to introduce a direction to that effect in the decree, otherwise it will not be supported.⁴

§ 312. Where a party is guilty of a contempt, by the breach of an injunction, the proper course of proceeding is to obtain an order for his committal. This order must be obtained upon motion, of which notice must have been duly served upon him personally.⁵ If the decree require the delivery of the possession of lands, and the lands be within the jurisdiction of the court, and the defendants refuse to perform the decree, the court will enforce it by a writ of assistance, directed to the sheriff. This writ is an incident to the injunction, and is issued, whenever it becomes necessary to aid in enforcing it.⁶

¹ 3 Dan. Ch. Pr. 1895.

² *Minturn v. Seymour*, 4 Johns. Ch. 173; *Chesapeake and Ohio Canal Co. v. Baltimore and Ohio Railroad Co.*, 4 Gill and Johns. 7.

³ 3 Dan. Ch. Pr. 1896.

⁴ *Ibid.*, 1902-3.

⁵ *Ibid.* 1909.

⁶ *Com. v. Dffenbach, Nisi Prius*, Lewis, J., 5 May 1854. MS.

The rule of court provides that "when any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the prothonotary of the court."¹ And this writ is so much a matter of course that the prothonotary may issue it in the cases prescribed by the rule, without any application to the court.²

§ 313. The effect of a committal for a breach of injunction, is usually that of retaining the offender in prison until he submits by paying the adverse party his costs. It is to be observed, however, that if the breach of injunction were the result rather of an error in judgment than of a wilful contempt, the court will not direct a commitment, but will merely order the party to pay costs incurred by the breach of the injunction, and by the application. The plaintiff may also, by his acquiescence in the breach, dispense with the ordinary process; though, strictly speaking, no act of the parties can amount to a waiver of a contempt of the court.³

¹ Equity Rules, ix. p. 114.

² *Com. v. Diffenbach*, ut supra.

³ 3 Dan. Ch. Pr. 1911.

CHAPTER XVI.

TRUSTS.

§ 314. WE come now to treat of what is generally termed the exclusive jurisdiction of courts of chancery, although in Pennsylvania, this jurisdiction is to a great extent exercised concurrently by the courts of law; and, first, in relation to trusts, which form one of the most important divisions of this branch of our subject. The supreme court, the several district courts, and the courts of common pleas are invested, by statute, with the jurisdiction and powers of a court of chancery, so far as relates to the control, removal, and discharge of trustees, the appointment of trustees, the settlement of their accounts, the care of trust moneys and property, and other moneys and property made liable to the control of the said courts.¹ Many of the powers here referred to, the courts are empowered, by other acts of assembly, to exercise on petition, without bill; the principles, however, on which relief is granted are the same, in whatsoever mode the jurisdiction may be enforced;² and in regard to testamentary trusts, the orphans' courts are invested, in all cases, with a concurrent jurisdiction.³

¹ Purd. Dig. 305.

² Ibid. 802.

³ Ibid. 621. The object of the legislature, in the enactment of the several acts of assembly relating to trusts, was to invest our courts with the powers elsewhere exercised by courts of chancery generally, to supervise the execution of trusts, to prevent their failure, to punish their abuse, and to compel

§ 315. The jurisdiction to enforce performance of trusts arises where property has been conferred upon, and accepted by, one person on the terms of using it for the benefit of another. The former person, or owner at law, is called the trustee; the latter, or owner in equity, the *cestui que trust*. In order to originate a trust, two things are essential: first, that the ownership conferred be coupled with a trust, either declared by the parties, or resulting by presumption of law; and secondly, that it be accepted on those terms by the trustee.¹

§ 316. It is well settled, that in Pennsylvania a trust may be created by parol; the seventh section of the English statute of frauds, which requires all declarations of trust to be in writing, not having been adopted in this state.² Parol trusts, in opposition to written titles, are not to be favoured; still it is true, that trusts may be established by parol; and when clearly proved, equity will decree the execution of them.³ The evidence to sustain a parol declaration of trust ought to be scrutinized with care and caution; the party may demand an issue, by which the facts will be ascertained by a jury trial; and the conscience of the court must be satisfied as well as that of the jurors. But still, if it produce a full and conscientious conviction, it must have its effect.⁴

exhibits, from time to time, of their state and condition, where accounts are necessary and proper for that purpose. Being highly remedial in their character, they should be liberally expounded, and extended in cure of the defect which was so glaring in our original legal system, as to become the object of universal complaint. *Kuhler v. Hoover*, 4 Barr, 333-4.

¹ Adams' Eq. 26-7. To constitute a valid trust, three circumstances must concur: sufficient words to raise it, a definite subject, and a certain and ascertained object. *Vint v. King*, 2 Am. L. R. 724.

² *Murphy v. Hubert*, 7 Barr, 420; *Champlin v. Williams*, 9 Barr, 342; *Tritt v. Crotzer*, 1 Harris, 451; *Wetherell v. Hamilton*, 3 Harris, 198; *Kirkpatrick v. McDonald*, 1 Jones, 391.

³ *Lynch v. Cox*, 11 Leg. Int. 166.

⁴ *Tritt v. Crotzer*, 1 Harris, 455.

§ 317. It is said, that uses or trusts to be raised by any covenant or agreement of a party in equity, must be founded upon some meritorious or some valuable consideration; and that courts of equity will not enforce a mere gratuitous gift, or a mere moral obligation.¹ But is it true, that equity will not enforce an executory trust in favour of a volunteer? It will doubtless not enforce a contract *to create* a trust, though it were under hand and seal, and in this respect it carries the doctrine of *nudum pactum* farther than even the law does; but the difference between a covenant to create a trust and a trust created, is as wide as the difference between a covenant to convey and a conveyance executed. It enforces no executory contract which does not rest on a valuable, or at least a meritorious consideration; but it enforces an executed contract with as much alacrity as the law would enforce it. The reason of the difference in regard to the effect of a seal is, that the interposition of a chancellor is matter of favour; but that the interposition of a court of law, with whom a seal stands for a consideration, is matter of right. While a contract for a trust, therefore, is executory, the trust itself is held to be executory, and it stands on the footing of any other executory contract, in respect to which a chancellor is guided by his apprehension of the justice of the contract, in applying or refusing his power to the execution of it; but when the legal estate has passed by a conveyance, in which a trust is distinctly declared, the trustee will not be allowed to set up want of consideration to defeat it.²

§ 318. It is generally true, that equity applies the same rules of construction to trust estates that a court of law applies to legal estates. This general proposition,

¹ 2 Story's Eq. § 973.

² Dennison v. Goehring, 7 Barr, 178.

however, is liable to many exceptions, where a departure from the rigid technical rules of law is necessary, to give effect to the limitations of the trust estate. Fearne says, after noticing some of these exceptions, and particularly cases in which Lord Hardwicke had denied the application of the rule in Shelley's case to limitations of trust estates, that "even a court of equity, in order to preserve as near a correspondence as may be, between the rules of construction, with regard to trust estates and those laws by which legal estates are construed, considers itself as bounden, even in the case of trust estates, to decree according to the rule I have been speaking of, wherever it can be done without manifest violation of the intention of the parties."¹ And in discussing the same rule, Judge Story says, that "trusts in real property, which are exclusively cognizable in equity, are now in many respects governed by the same rules as the like estates at law, and afford a striking illustration of the maxim *æquitas sequitur legem*. Thus, for example, they are descendible, devisable, and alienable; and heirs, devisees, and alienees may, and generally do, take therein the same interests in point of construction and duration, and they are affected by the same incidents, properties, and consequences, as would, under like circumstances, apply to similar estates at law."² And therefore, on the death of a *feme covert* possessed of an equitable estate in real and personal property, her husband becomes entitled to her portion of the trust estate, absolutely so far as it consists of personalty, and to a life estate in the real property.³

¹ Fearne, 184; *Vint v. King*, 2 Am. L. R. 727.

² 2 Story's Eq. § 974; *Vint v. King*, 2 Am. L. R. 727-8; *Wilhelm v. Folmer*, 6 Barr, 299.

³ *Van Rensalaer v. Duncan's Estate*, Supreme Court, 4 January 1855. MS.

§ 319. A trust estate is not only alienable by the act of the party, but it is also liable to be disposed of by operation of law, *in invitum*, like any other property.¹ It is well settled, that in Pennsylvania, a judgment is a lien on every kind of equitable, as well as legal estate in land, vested in the debtor, at the time of the judgment; and such interest may be seized and sold in execution in payment of debts.² Thus, although it is true, that an assignment of real estate for the benefit of creditors passes the legal title, which is not defeated by the assignees' refusal to act, but vests in those whom the court appoints to execute the trust, yet a trust results by operation of law, which, as soon as the debts are satisfied, entitles the assignor to the possession of whatever of the estate remains unconverted: and this interest is the subject of lien, of levy, and of sale.³

§ 320. It not unfrequently happens that a trust has been created, and no person has been appointed, either by name or description, to execute the same; in such cases the courts are empowered to appoint a proper and suitable person to execute the trust, it being a rule in

¹ 2 Story's Eq. § 974 b; *Wilhelm v. Folmer*, 6 Barr, 299.

² *Thomas v. Simpson*, 3 Barr, 69; *Rickert v. Madeira*, 1 Rawle, 329; *Streaper v. Fisher*, *Ibid.* 162; *Humphreys v. Humphreys*, 1 Yeates, 429; *Shaupe v. Shaupe*, 12 S. & R. 12; and see *McKissick v. Pickle*, 4 Harris, 149-50. But where a father devised lands to trustees, in trust, during the life of his son, to pay the income thereof to the son, or to such person as he should appoint; and, after his death, to convey according to the son's appointment by will, or in default, to such as would be his heirs, if he died intestate, with power to the trustees and son to dispose of the property and re-invest the proceeds; and, with a proviso, that if the son should become so relieved from embarrassment as, in the opinion of the trustees, to render it expedient, they should convey to him in fee; it was held, that the son had no estate in the land, legal or equitable, which could be seized and sold by execution, on a judgment obtained against him. *Vaux v. Parke*, 7 W. & S. 19.

³ *Webb v. Dean*, 9 Harris, 32.

equity that a trust shall never fail for want of a proper trustee.¹ The courts are also authorized to appoint trustees, whenever "any sole trustee shall renounce the trust, or refuse to act under, or fully execute the same; or when any such trustee shall die, or be dismissed from the trust, or be discharged therefrom; or when one or more of several trustees shall renounce or refuse as aforesaid, or shall die, or be dismissed, or discharged, and the duties of the trust require the joint act of the trustees."² They may also appoint a trustee to act during the infancy or temporary absence of the proper trustee.³ And when the trustees of any estate reside out of the commonwealth, and any part of the trust estate is situated within the state, the courts may appoint a trustee or trustees resident within the commonwealth, to act in conjunction with such foreign trustees in the management of the trust.⁴ And in general, it may be stated, that by the common law, the heir of a trustee of real estate succeeds to the trust at the death of his ancestor, because the title to the legal estate descends upon him. But he becomes a trustee only prospectively, and accountable only for his own management of the trust; he has no concern with the accounts of his predecessor, which can be settled only by his personal representative.⁵ When, however, a trustee is appointed by the court to fill a vacancy in the trust, all the trust estate, forthwith, by operation at law, without any act or deed, passes to, and vests in such succeeding trustee.⁶

§ 321. Whenever the trust is of such a nature as to require any personal attention or active duty to be performed; or the exercise of a power to be exerted on the

¹ Purd. Dig. 804; *Eyrick v. Hetrick*, 1 Harris, 494.

² Purd. Dig. 804.

³ Ibid.

⁴ Ibid. 807.

⁵ Baird's Appeal, 3 W. & S. 460.

⁶ Purd. Dig. 805.

part of the trustee, either for the purpose of carrying the trust into effect, or for keeping it alive and fully operative at all times, in favour of the *cestui que trust* or other persons interested therein, agreeably to the intent of its author; the court of common pleas of the proper county may, upon the application, by petition, of such *cestui que trust* or other person interested in the execution of the trust, appoint a trustee, if one should be wanted for such purpose. But when the original trustee or trustees are made the mere receptacles and depositories, as it were, of the legal title, in fee, to the estate granted to them in trust, without the requirement of any positive duty or act whatever, either express or implied, to be done and performed by them, it is clear that the interference of the court is not called for by the acts of assembly, as long as any one of the trustees or heirs of the survivor is in being; and the appointment of a trustee by the court would, in such case, be unauthorized. The deaths of the original trustees in such instances cannot affect the interests of the *cestui que trust* or other persons interested in the trust estate; because, upon the death of one of the trustees, the legal title to the trust estate will survive to the other; and again, upon the death of the survivor, the title will pass, by operation of law, to his heir at common law, who will be quite as capable of receiving and preserving the title of the trust estate till his death, as his ancestor was, when the law will again transmit the title to the heirs at law of the heirs of the survivor; and will thus, by means of every succeeding heir at law of the person last invested with the legal title, continue to transmit it so long as heirs to the surviving trustee shall remain or continue to exist.¹

¹ Carlisle's Appeal, 9 Watts, 332; and see *Ex parte Conrad*, 2 Ash. 528-9.

§ 322. The power of a trustee over the legal estate or property vested in him, properly speaking, exists only for the benefit of the *cestui que trust*.¹ It is true, that he may, as legal owner, do acts to the prejudice of the rights of the *cestui que trust*, and he may even dispose of the estate or property, so as to bar the interest of the latter therein; as by a sale to a *bonâ fide* purchaser, for a valuable consideration, without notice of the trust.² But it is well settled, that a trust will be enforced not only against those who are rightfully possessed of the fund as trustees, but also against all others who have obtained it without consideration, or with notice of the trust.³ The conversion of trust money, or choses in action, into land, is not permitted to divest its fiduciary character, and a court of chancery will pursue it wherever it can be traced.⁴ Equity looks to the manner in which a trustee has disposed of the fund, and pursues it into the hands of any one who has received it *malâ fide*—in other words, with notice of the trust.⁵ For courts of equity consider the purchaser with notice, of trust property, from a fraudulent trustee, as a trustee for the beneficial owner, and what is sufficient to put a party on inquiry is considered in equity as notice; for the law imputes to a purchaser the knowledge of a fact, of which the exercise of common prudence and ordinary diligence

By act of 3d May 1855, the courts are authorized to appoint trustees to fill a vacancy in the trust, occasioned by the death of a surviving trustee, although the legal title may have descended to his heir at law. P. L. 415.

¹ *Wilhelm v. Folmer*, 6 Barr, 300.

² 2 Story's Eq. § 977; *Lee v. Tiernan*, Add. 349; *Shortz v. Unangst*, 3 W. & S. 55; *Bracken v. Miller*, 4 W. & S. 102; *Coxe v. Blanden*, 1 Watts, 535.

³ *Harrisburg Bank v. Tyler*, 3 W. & S. 377.

⁴ *Kirkpatrick v. M'Donald*, 1 Jones, 393; *Philips v. Crammond*, 2 W. C. C. 441; *Pierce v. M'Keehan*, 3 W. & S. 280; *Thompson's Appeal*, 10 Harris, 17.

⁵ *Harrisburg Bank v. Tyler*, 3 W. & S. 378.

must have apprized him. And to make a purchaser of the legal estate a trustee for the *cestui que trust*, it is not necessary that he should have notice of the particular *cestui que trust*; it is sufficient if he have notice that the person from whom he purchased is a trustee.¹ So long as it can be identified either as the original property of the *cestui que trust*, or as the product of it, equity will follow it; and the right of reclamation attaches to it, until detached by the superior equity of a *bonâ fide* purchaser, for a valuable consideration, without notice. The substitute for the original thing follows the nature of the thing itself, so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail. This is always the case, when the subject matter is turned into money, and mixed and confounded in a general mass of property of the same description.²

§ 323. The powers that may be properly exercised by a trustee, depend upon the nature of the trust, and sometimes upon the character and situation of the *cestui que trust*. It is clear that a trustee, not specially authorized, cannot go beyond the line of duty prescribed by law, and make changes of property from money into land, or from land into money: if he invest money in land, the *cestui que trust* may, at his option, accept of the land, or refuse it and demand the money.³ He may do such things in respect of the trust estate as he is expressly empowered to do; and thus sometimes, incumber, or even sell it; as where he is directed to raise money out of the rents and profits, for meritorious purposes, such as the payment

¹ Walsh v. Stille, 2 Pars. 21-3; see Scott v. Gallagher, 14 S. & R. 333; Stewart v. Freeman, 10 Harris, 123-4.

² Thompson's Appeal, 10 Harris, 17.

³ Kaufman v. Crawford, 9 W. & S. 134; Bonsall's Appeal, 1 Rawle, 274.

of debts and legacies. It is perhaps also true, that where a trustee, from the nature of it, cannot properly discharge his trust, without the exercise of power over the subject intrusted to him, the law concedes to him the necessary authority and discretion, so far as is essential to effectuate the object of the trust. But the principle that lies at the foundation of such a right cannot be invoked to sanction the creation of an incumbrance by judgment, which might eventually defeat the trust at law, though the object be to secure payment of part of the purchase money. Powers of leasing, sale, and exchange are said to be, in fact, powers of revocation; and the same is true, at least to a certain extent, of a power to incumber; all of which must be reserved to the trustee expressly, or at least by strong implication.¹

§ 324. The courts have the power, on application of the party interested, to compel the conveyance by trustees of the legal estate, when the trust has been executed or has expired;² where, however, the legal estate is vested in the *cestui que use*, by force of the statute of uses, a conveyance of it will not be decreed.³ They may also compel an infant trustee, or his guardian, to make and execute such deeds or assurances of the trust estates, to the persons entitled thereto, as shall be equitable and just, with the same effect as if such infant trustee were of full age.⁴ And they may make such orders and decrees for carrying any trust into effect, either for the distribution of moneys in the hands of trustees for the benefit of creditors, or for the payment or transfer of funds or effects in the hands of other trustees, or other-

¹ Wilhelm v. Folmer, 6 Barr, 300.

² Purd. Dig. 805.

³ Rush v. Lewis, 9 Harris, 72.

⁴ Purd. Dig. 807.

wise as shall be according to law, or the terms or intent of the trust.¹

§ 325. Whatever may be the rule in courts of equity in England, and in other states, it is well settled in Pennsylvania, that all trustees are entitled to compensation for their services in the execution of the trust, whether there be any provision or agreement respecting it or not. The amount of such compensation depends on the nature of the trust, and the fund or property; as the execution of the trust is more or less burdensome to the trustee, the compensation varies accordingly.² Unless a contrary intention appear, the compensation must come out of the income of the fund with which they are intrusted.³ The amount of compensation to be allowed to an executor, or other trustee, is a subject on which there has been great difference of opinion; and it is no wonder; for the law has fixed no certain compensation, nor is it possible for the court to establish a rate of commission which will do justice in all cases. An executor, or other trustee, should receive a compensation adequate to his care and trouble, besides a liberal allowance for all necessary expenses; but it would be debasing the sanctity of the trust, to consider it as an office of profit; it is an honourable duty, which ought not to be undertaken from motives of mere gain. Still, it is not to be expected, that executors should sacrifice their time, and subject themselves to hazard, without some remuneration; but the difficulty is in fixing the quantum. It is very desirable, both for the sake of the executors and the family of the testator, that there should be some standard to which both may look, on the subject of commissions; and in the cases

¹ *Purd. Dig.* 805. ² *Burr v. M'Ewen*, 1 *Bald.* 163; *Purd. Dig.* 805.

³ *Spangler's Estate*, 9 *Harris*, 337.

that generally occur, it appears that the common opinion and understanding of the country has fixed upon five per cent. as a reasonable allowance. But to this rule there must be exceptions: there are estates where the total amount is small, and that too collected in dribblets; in such, five per cent. would be insufficient. On the contrary, there are others, where the total amount being very large, and made up of sums collected and paid away in large masses, five per cent. would be too much. It must be left to the discretion of the courts, to ascertain those cases in which the general rule should be departed from. The personal care and anxiety of the executor is a fair subject of consideration: an estate not equal to the payment of its debts is always attended with hazard, which should not be forgotten in fixing the compensation.¹

§ 326. We have already seen, that all trustees are liable to account in a court of equity for the management of the trust estate;² and the courts are empowered to dismiss a trustee from his trust and to appoint another in his place, whenever it shall appear that such trustee is wasting, neglecting, or mismanaging the trust estate; or is in failing circumstances; or is about to remove out of the commonwealth; in all such cases, the courts may either require security from the trustee for the due execution of the trust, or dismiss such trustee, or make such other order in the cause as may be agreeable to the rules of equity. They may also, on due proof, dismiss a trustee, who shall have been declared to be a lunatic or habitual drunkard, or shall have removed from the state, or ceased to have a known place of residence therein, during the period of a year or more. And on the dismissal of a trustee, they may appoint a receiver of the

¹ *Pusey v. Clemson*, 9 S. & R. 209.

² See *Purd. Dig.* 803-5.

trust estate.¹ It is not within the design of this work to enter more minutely into an examination of the statutory provisions in regard to official and other trustees, and the jurisdiction conferred upon the several courts to regulate their proceedings: for these matters the reader is referred to Purdon's Digest of the Laws of Pennsylvania, where they will be found at large.²

§ 327. We will now proceed to the consideration of the doctrine in regard to trusts, as divided into express trusts and implied trusts; the latter class comprehending all those which are called constructive and resulting trusts. Express trusts are those which are created by the direct and positive acts of the parties. Implied trusts are those which are deducible from the nature of the transaction, as matter of clear intention; or which are superinduced upon it, as matter of equity, independent of the particular intention of the parties.³ The most usual instances of express trusts are found in marriage settlements, mortgages, assignments, and in last wills and testaments. Many of these instruments will also be found to contain implied, constructive, and resulting trusts, and the separate consideration of them would require frequent repetition: in our subsequent remarks, therefore, no attempt will be made to distinguish between them, except where it is called for by the particular nature of the subject.

¹ Purd. Dig. 804.

² Ibid. 802-9.

³ 2 Story's Eq. § 980.

CHAPTER XVII.

MARRIAGE SETTLEMENTS.

§ 328. A MARRIAGE settlement is an agreement made by the parties in contemplation of marriage, in relation to their estate or some parts of it, by which it is tied up and declared to be for the uses therein mentioned. But a distinction must be observed between a settlement made before marriage, and marriage articles only for a settlement; when a settlement is made after marriage in pursuance of articles made before, it will be controlled by the articles.¹ In regard to the construction of these instruments, the rule is, that with regard to marriage settlements, when the trusts are accurately created and defined by the parties, and consequently may be said to be *executed*, courts of equity construe them in the same way as legal estates of the same kind would be construed at law, if the same terms had been used. Technical words in such a contract must have a technical interpretation; and hence, a relinquishment by the intended wife of all right of dower to, in, or out of the estate of the husband, will not exclude her, after his decease, from a share of his personal estate under the statute of distributions.² But in moulding legal conveyances, to give effect to executory trusts in marriage settlements, a chancellor interprets the deed as freely as he would interpret a will, be-

¹ 4 Bouv. Inst. 238.

² *Ellmaker v. Ellmaker*, 4 Watts, 89.

cause it contains no more than hints or instructions for a formal settlement; and he consequently treats an executory limitation to heirs of the body, as a direction to dispose of the estate at law, in strict settlement, by giving estates to the first and other sons in tail.¹

§ 329. Articles in consideration of and previous to marriage, are considered in equity as the heads of an agreement for a valuable consideration;² they will be so construed as to carry into effect the intention of the parties, for the benefit of the issue, for whom they are purchasers; and any mistakes will be corrected by reforming the article or settlement. A settlement after marriage, reciting articles before marriage, may be reformed by them, if it were intended to be pursuant to the articles; any variation between them being presumed to be by accident. But the evidence of the intention, by which to make the reformation, must be by a recital, a letter of instructions, or declaration of intention, not by conjecture, but in words showing it; otherwise the variance is presumed to be by a new agreement.³ A settlement preceded by articles, and executed before the marriage, will not be reformed so as to render it conformable to the articles, unless it purport to have been made in pursuance of the articles, or there be proof of a mistake *dehors*; the variation being attributed to a change of intention, which the parties had a right to make. A contract executed at law, and passing nothing but real estate, actually in the grantor at the time of the delivery, can be turned into an agreement in equity, only to subserve some clear and indisputable intention, inconsistent with the legal effect of the instrument.⁴

¹ *Hileman v. Bouslaugh*, 1 Harris, 352.

² *Middleton v. Middleton*, 8 Leg. Int. 115.

³ *Tilghman v. Tilghman*, 1 Bald. 489; *Tilghman's Estate*, 5 Wh. 63.

⁴ *Biddle v. Ash*, 1 Rawle, 86-8.

§ 330. The great object of marriage settlements, is to restrain the parties from disposing of the fund to the prejudice of the wife and issue; and it is in their favour, and necessarily against the husband, that equity reforms and construes them liberally to embrace the object intended: this will be done in favour of the husband or wife, where they claim in consideration of a settlement made, or to be made by them or their friends, so as to make the contract operate beneficially for the party intended to be benefited by it. But if the plaintiff in equity have not completed his promised provision for his wife and issue, or if, by her death without issue, he have suffered no prejudice by what he has done towards its completion, or if, by the agreement, the portions were to be equal, and the husband have not made up his, equity will leave him to his legal remedy.¹

§ 331. If an instrument, professing or intending to carry an agreement into effect, be so drawn by mistake as not to effect the object, it will be reformed in conformity therewith; the instrument being insufficient for the purpose intended, the agreement is considered unexecuted, and the delinquent party will be held to its performance. If, however, the parties have deliberately agreed on an instrument to effect their intention, which meets the views of both, it becomes incorporated into their agreement, and if not founded in mistake in fact, and executed in strict conformity with itself, equity will not decree another security, or act as if it had been agreed on or executed. It will compel the execution of agreements fairly made, but will not make them for parties, or decree the execution of any other instrument than the one agreed on. The death of the party who

¹ *Tilghman v. Tilghman*, 1 Bald. 489.

was to execute the instrument which would give efficacy to the agreement, though it frustrates the intention of the parties by an event not provided for, does not alter the case. But where the parties have, on deliberate advice, rejected one instrument and adopted another, equity will not decree a different one to be executed, or that to be done which the parties supposed would be effected by the instrument finally agreed upon.¹

§ 332. A contract, in consideration of a future marriage, creates a legal and equitable obligation to perform it in good faith: if the contract be executed, the parties become purchasers; if it remain executory till after marriage, they become creditors after its consummation; or assume *pro tanto* the character and rights of both, if executed only in part; entitled to the protection of all courts in enjoying what is granted, and their aid in enforcing performance of what remains to be done. And if either party voluntarily perform what a court would compel to be done, it will be as valid as if done by its judgment or decree, or as if the execution had been completed in the date of the contract.²

§ 333. Every kind of interest, legal or equitable, whether in real or personal estate, may be the subject of a marriage settlement. It is certain that though a contingent limitation by will after the death of the testator, or by deed, is a legitimate subject of grant, even at law, yet the hope or expectation of succeeding to the property of another, by descent or devise, is not so. But it is equally certain that such an interest may be bound by a settlement in equity. Indeed, it is no more than the familiar principle, that he who executes a conveyance, on valuable consideration, purporting to pass a title before

¹ Ibid. 490; *Hunt v. Rousmaniere*, 1 Pet. 9, 17; s. c. 8 Wheat. 201, 210.

² *Magniac v. Thompson*, 1 Bald. 359.

it is in him, will be bound to make it good, whenever he acquires it. Such a conveyance is liberally interpreted as an agreement.¹ Where the subject of the marriage contract is the wife's chattels, it need not be in writing. Such a parol antenuptial settlement being in consideration of marriage, which is a valuable one, is binding at the expiration of the coverture.²

§ 334. It is said, that "where an infant wife's property consists of land, an antenuptial agreement binds neither the wife nor her heir. But it will bind her adult husband; who, accordingly, will not be allowed to aid the wife in any attempt to defeat the uses of the articles. Thus, as a married woman, she cannot, even after attaining majority, dispose of her estate without her husband's consent. And he cannot consent, because the articles prevent him from doing so. This, therefore, is but another example of an agreement binding on the adult husband, but not binding on the infant wife; for the restraint upon her arises, not from the articles, but from her coverture."³ Our courts have not yet decided how far a female infant may bind her estate in this way; but they have declared that the adult husband is bound by his covenant not to assume any power over the settled estate, and that, in equity, he has no interest in it inconsistent with the settlement. He cannot join his wife in aliening or incumbering it; and as she cannot do it without him, therefore the settlement is necessarily operative during his life, not by her contract, but by reason of her marital, and his contract disability.⁴

¹ Wilson's Estate, 2 Barr, 330.

² Gackenbach v. Brouse, 4 W. & S. 547.

³ Macqueen on Husband and Wife, 252; Macpherson on Infants, 522; Roper on Husband and Wife, 27; Atherly on Marriage Settlements, 49.

⁴ Wilson v. McCullough, 7 Harris, 87; s. c. 9 Harris, 441.

CHAPTER XVIII.

MORTGAGES.

§ 335. BY the principles of the common law, the execution of a mortgage vests the legal estate in the mortgagee, subject to be defeated upon performance of the condition.¹ The possession of the tenant in the mortgage was viewed, at law, as that of a tenant at sufferance.² But although, in form, a conveyance of the land, a mortgage is, in substance, but a security for the payment of money; and the debt being paid, or in any other manner extinguished, the mortgagee becomes a trustee for the mortgagor.³ It is but a *chose in action*,⁴ and confers upon the mortgagee nothing more than a lien on the land, which may be defeated by payment of the money loaned, at any time before a sale by the sheriff. The equity of redemption is every where considered as an interest in the land mortgaged, which will descend upon the heir of the mortgagor, who, in legal contemplation, continues to be the owner of the land for every beneficial purpose. So far is this doctrine carried, that a devise of a man's personal estate carries with it all his mortgages; and though the land mortgaged may be taken

¹ 4 Kent's Com. 154; *Garro v. Thompson*, 7 Watts, 419.

² *Schuylkill Navigation Co. v. Thoburn*, 7 S. & R. 419.

³ *Wentz v. Dehaven*, 1 S. & R. 317; *Rickert v. Madeira*, 1 Rawle, 328; *Perry's Appeal*, 10 Harris, 46.

⁴ *Craft v. Webster*, 4 Rawle, 255; *Woods v. Wallace*, 10 Harris, 177.

in execution for the debt of the mortgagor, it is not so liable upon process against the mortgagee, before foreclosure of the equity of redemption.¹

§ 336. A mortgagee, in possession, is treated as a trustee, but, out of possession, he is a mere lien creditor. By the terms of the contract, it is true, he is to have, not a lien, but an estate; but the effect of the instrument is to give him only a lien, which differs from a lien by judgment in only two essential particulars, duration and extent. It is subject to no statute of limitations like a judgment, and instead of extending to all the debtor's lands in the county, it affects only such as are described in the mortgage. But a mortgagee is no more a trustee of the debtor, than a judgment creditor is; both have liens, and only liens. The whole legal and equitable estate remains in the mortgagor, and every incident of seisin and ownership pertains to him, whilst no one of them belongs to the mortgagee. For purposes of taxation, inheritance, execution, sale, and protection from trespass, the mortgagor's title is treated as if the mortgage had not been made. In all respects, he is the sole and absolute owner of the estate; an incumbered estate, but nevertheless a complete legal and equitable estate. The mortgagee, on the other hand, has only a *chose in action*, a security for debt, which may be transferred by parol, and which, at his death, descends to his administrator as mere personalty.²

§ 337. Every conveyance of land which is in fact a security, either for an antecedent debt, or for advances made at the time, is, in contemplation of equity, a

¹ *Asay v. Hoover*, 5 Barr, 35; *Rickert v. Madeira*, 1 Rawle, 325; *Claason's Appeal*, 10 Harris, 363.

² *Blocker v. Blocker*, 11 Leg. Int. 62; *Presbyterian Corporation v. Wallace*, 3 Rawle, 127-30.

mortgage, and entitles the debtor to a re-conveyance of the estate, on payment of the debt. This right is one of pure equity, not only independent of the agreement between the parties, but paramount to it, and may be enforced without regard to the form of the conveyance, and even in opposition to its terms. It has long been well settled, under this doctrine, that where a deed absolute on its face is conditioned to be void on the payment of a debt, at a day certain, payment may be made after the day, although in direct contravention of the deed. The general rule is, that every one may renounce a right introduced for his own benefit. But no waiver or renunciation by the mortgagor of the right of redemption, however express, will be allowed to defeat or even impair his power of exercising it himself, or transferring it to others. It has its origin in a general policy superior to particular agreement, and is a necessary and inseparable incident to every conveyance, which is in substance a security for a debt.¹

§ 338. There is, however, no principle of law or equity, which prohibits a conditional contract for the sale of real or personal property, or forbids a vendor to make an absolute conveyance of the property sold, subject to an agreement, that he shall be entitled to a re-conveyance, upon re-payment of the purchase money, or paying any other sum certain, or capable of being reduced to certainty, on or before a period fixed by the terms of the agreement.² The criterion between a mortgage and a conditional sale is, a redeemable quality in the grant, and right to exact the whole money, if the property were

¹ 2 Lead. Cas. in Eq., Am. Ed., pt. 2, p. 430; *Rankin v. Mortimere*, 7 Watts, 375; *Stoevers v. Stoevers*, 9 S. & R. 446-7; *Hiesters v. Maderia*, 3 W. & S. 388; *Wharf v. Howell*, 5 Binn. 503; *Colwell v. Woods*, 3 Watts, 196.

² 2 Lead. Cas. in Eq., Am. Ed. pt. 2, p. 437.

of less value than the money advanced.¹ But in Pennsylvania it has been determined, that a conveyance and *simultaneous* covenant to re-convey on re-payment of the purchase money before a given day, must be construed to be a mortgage, though it appear by parol that the parties did not intend it to be so; and that it is not competent to the parties to prove by parol, that the defeasance was a subsequent and independent agreement.²

§ 339. It is a necessary result of the doctrine, that the right of redemption attached by chancery to every deed made merely as a security, qualifies the deed itself; that when an absolute deed, subject to an express or implied defeasance, is recorded without the defeasance, the record is invalid, and consequently inoperative as notice to a subsequent incumbrancer. For, under these circumstances, the instrument put on record is only a part of the contract between the parties, and does not satisfy the requisitions of the law, which requires that the whole should be recorded.³ A mortgage thus imperfectly recorded, is void as an unrecorded mortgage, against subsequent liens. But if a purchaser or a subsequent mortgagee have notice of the fact of such a deed and defeasance, he is, in equity, bound to the same extent and in the same manner as the person of whom he purchased.⁴

§ 340. There is no doubt that a valid mortgage may be created by a written instrument not under seal.⁵ But

¹ *Stoever v. Stoever*, 9 S. & R. 454; *Russell's Appeal*, 3 Harris, 322. See *Colwell v. Woods*, 3 Watts, 197; *Brown v. Nickle*, 6 Barr, 391.

² *Brown v. Nickle*, 6 Barr, 391; *Woods v. Colwell*, 3 Watts, 196; *Kerr v. Gilmore*, 6 Watts, 405; *Woods v. Wallace*, 10 Harris, 176.

³ 2 Lead. Cas. in Eq., Am. Ed. pt. 2, p. 443; *Friedley v. Hamilton*, 17 S. & R. 70.

⁴ *Jacques v. Weeks*, 7 Watts, 261; *Manufacturers and Mechanics' Bank v. Bank of Pennsylvania*, 7 W. & S. 335.

⁵ *Woods v. Wallace*, 10 Harris, 171.

there can be no such thing in Pennsylvania, as a valid and efficacious parol mortgage by deposit of the title deeds; whether considered as a conveyance of lands, as it may ultimately prove to be, or as a lien upon lands, which is its ordinary state, a parol mortgage is contrary to the spirit of our legislation, in the statute of frauds, in the acts for recording of mortgages, and to the uniform current of decisions on these subjects.¹ In case of an equitable mortgage, which may be created by a written agreement and deposit of the title papers, a chancellor will decree a sale of the land in payment of the debt; for it is but a security for the debt, and does not vest any interest, or estate, in the land itself. The equitable mortgagee cannot by any process obtain possession, for an ejectment will not lie as on a legal mortgage;² nor, it seems, could he maintain a *scire facias*, under the act of 1705, whereby the mortgaged premises might be taken in execution, and sold for payment of the debt.³

§ 341. Though there have been some doubts entertained of the effect of a mortgage to secure the mortgagee against debts or responsibilities not then incurred, and therefore not appearing of record; yet it seems to be settled, that a mortgage or judgment may be taken and held as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement; and the future advances will be covered by the lien, in preference to a claim under a junior intervening incumbrance, with notice of the agreement. A mortgage is always good to secure future loans, when there is no intervening equity. It is necessary,

¹ Shitz v. Dieffenbach, 3 Barr, 234; Bowen v. Oyster, 3 Penn. R. 240-1; Insurance Co. v. Union Canal Co., Bright. R. 51.

² Rickert v. Madeira, 1 Rawle, 327-8.

³ Insurance Co. v. Union Canal Co., Bright. R. 51.

however, that the agreement, as contained in the record of the lien, should give all the requisite information of the extent and certainty of the contract, so that a junior creditor may, by inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance.¹ It is only where the rights of third persons are prejudiced by want of notice, that the extent of the security is prevented.²

§ 342. It may also be regarded as settled, that when such mortgagee makes future advances, upon the faith of his incumbrance, with actual notice of a new intervening incumbrance, the latter will be entitled to a preference. And where the party is under no obligation, by his contract, to make such future advances, he is bound, before doing so, to look to the existing state of the record; and a junior intervening incumbrancer will have a preference, in such cases, over the lien of the mortgagee for such future advances.³ Where, however, the obligation to make such future advances, is a constituent part of the agreement, the prior mortgagee will be entitled to a preference, whether he have notice or not of the junior intervening incumbrance; and the junior incumbrancer will only be preferred where he has no notice, or means of knowing the agreement under which such future advances have been made.⁴ And if there be a covenant to make such future advances, it matters not that it is contained in a separate unrecorded instrument.⁵

¹ *Garber v. Henry*, 6 Watts, 59; *Lyle v. Ducomb*, 5 Binn. 585; *Irwin v. Tabb*, 17 S. & R. 422.

² *James v. Johnston*, 6 Johns. Ch. 429; *Truscott v. King*, 2 Seld. 161.

³ *Ter Hoven v. Kerns*, 2 Barr, 96.

⁴ *Parmentier v. Gillespie*, 9 Barr, 86; *Ter Hoven v. Kerns*, 98-9; *Truscott v. King*, 2 Seld. 157.

⁵ *Moroney's Appeal*, 3 Am. L. R. 169.

§ 343. The right of redemption exists, not only in the mortgagor himself, but in his heirs and personal representatives, and assignees, and in every other person who has an interest in, or a legal or equitable lien upon the lands; and, therefore, a tenant in dower or jointress, a tenant by the curtesy, a remainder-man or reversioner, a judgment creditor or any other incumbrancer, may redeem.¹ In a bill to redeem a mortgage, it is essential that the plaintiff offer to pay to the defendant his debt, interest, and costs; for such an offer is a condition precedent to any interference with the existing legal rights of the defendant.² But the mortgagee or his assignee can recover no more than the principal, interest, and costs due on the mortgage, on payment of which the court will stay proceedings on the *scire facias*. In Pennsylvania a simple contract debt cannot be tacked to a mortgage.³ And when once paid by the principal debtor, a mortgage is extinguished, and cannot be kept alive by assignment in fraud of his rights.⁴

§ 344. In Pennsylvania the legislature, as early as 1705, provided a remedy for the foreclosure of a mortgage by writ of *scire facias*, whereby the mortgagee can in all cases, after the expiration of one year from the time the mortgage became payable, have a judgment or decree for the sale of the mortgaged premises; and such sale will pass a title to the purchaser freed and discharged from the mortgagor's equity of redemption.⁵ Our action upon a mortgage is a substitute for the chancery remedy by bill of foreclosure, and it is not unreasonable to look to the chancery practice for the principles that govern

¹ 4 Kent's Com. 162.

² Lanning v. Smith, 1 Pars. 16-17.

³ Dorrow v. Kelly, 1 Dall. 142.

⁴ Kinley v. Hill, 4 W. & S. 426.

⁵ Purd. Dig. 234-5.

the remedy, except so far as these principles are explicitly or implicitly altered by our acts of assembly. For the defences that may be set up, we must look almost exclusively to chancery practice; bearing in mind, however, some substantial differences in our remedy, by which some of the chancery defences are necessarily excluded. Thus, in equity, a party has a right to bring his bill of foreclosure, on the first default in making payments; yet the court will stay the foreclosure on the defendant paying the instalments due, with interest and costs, and will allow the decree of foreclosure to be entered, and to remain subject to the order of the court on the next default.¹ But under our practice, where a mortgage is given to secure payment of money by instalments, a *scire facias* cannot be issued, until the whole becomes due;² except there be a stipulation, that on non-payment of any instalments the mortgagee may sue out a *scire facias* immediately:³ unless there be such a stipulation, the only remedy to recover the several instalments is by ejectment upon the mortgage, or by action upon the accompanying bond.⁴

§ 345. If the mortgagee suffer the mortgagor to remain in possession for twenty years after breach of the condition, without any payment of interest, or any admission of the debt, the right to a foreclosure will generally be deemed to be barred and extinguished.⁵ A presumption of payment from lapse of time, arises in the case of every species of security for the payment of money, whether bond, mortgage, judgment, or recognisance; and the computation runs from the period when

¹ Ewart v. Irwin, 7 Leg. Int. 134.

³ Huling v. Drexell, 7 Watts, 126.

⁵ 2 Story's Eq. § 1028 b.

² Fickes v. Ersick, 2 Rawle, 166.

⁴ Fickes v. Ersick, 2 Rawle, 166.

the money was demandable.¹ But this, like other presumptions, must yield and give way before any circumstances and facts, on which the mind can satisfactorily rest, by which it is rebutted or repelled. It has not the power or effect of a positive statutory enactment of limitation or oblivion, which extinguishes the original demand and requires a new promise to pay, or its equivalent. The mind must be free to admit the presumption, and if the exhibition of facts or circumstances interdict and forbid the conclusion, its protection is removed.²

§ 346. It is also a settled rule of equity, that if a mortgagor permit the mortgagee to hold possession for twenty-one years, without accounting, or without admitting that he possessed the mortgage title only, the mortgagor loses his right of redemption, and the title of the mortgagee becomes as absolute in equity as it previously was at law. Chancery will not interfere in favour of the mortgagor after twenty-one years, where the entry of the mortgagee was equivocal, or only under his defeasible legal title, or where no account has been rendered or demanded, or other acknowledgment of privity, trust, or subjection to the claim of the mortgagor.³ A chancellor applies the statute of limitations, in such cases, with the same substantial effect that it receives in a court of law.⁴

§ 347. It is not now to be questioned that a mortgage, being considered and treated as a mere security for the payment of money, or the performance of some other

¹ *Diemer v. Sechrist*, 1 Penn. R. 420; *Foulk v. Brown*, 2 Watts, 214; *Ingraham v. Cox*, 1 Pars. 76; *Wilkinson's Estate*, *Ibid.* 175.

² *Eby v. Eby*, 5 Barr, 437-8.

³ *Cromwell v. Bank of Pittsburgh*, 2 Wall. Jr. 578.

⁴ *Hamilton v. Hamilton*, 6 Harris, 22.

act, is simply a *chose in action* extinguishable by a parol release, which equity will execute as an agreement not to sue, or by turning the mortgagee into a trustee for the mortgagor; provided it proceed upon a sufficient consideration. Nor can it be doubted that such a release or agreement may be established, presumptively, by showing declarations and acts of the parties inconsistent with the averment of the continued existence of the mortgage, and repugnant to the rights and liabilities created by it, as well as by express proof.¹ And in general, the satisfaction of the principal debt, by payment or otherwise, will be deemed in equity an extinguishment of the mortgage.² There is no doubt, however, that a mortgage may be kept alive, even after payment in full, if such were the intention of the parties, and even though there be no actual assignment to a trustee. Equity will consider that as actually done which was agreed to be done, and not suffer the trust to fail for want of a trustee. But this is under the necessary exception that the rights of third persons, strangers, intervening, are not affected; for if they have equal equity, and the law be on their side, they must prevail in such a contest.³

§ 348. A mortgage will also, in general, be extinguished, where the mortgagee becomes the purchaser of the equity of redemption; for in such case it is a matter of indifference to the party, in whom the interests are united, whether the charge should or should not subsist.⁴ But it will have that effect in no case in which it is the interest and intent of the incumbrancer to keep the

¹ *Ackla v. Ackla*, 6 Barr, 230.

² *Kinley v. Hill*, 4 W. & S. 426.

³ *Wilson v. Murphy*, 8 Leg. Int. 106; *Mead v. York*, 2 Seld. 449; *Truscott v. King*, *Ibid.* 147.

⁴ *Helmhold v. Man*, 4 Wh. 422.

incumbrance afoot.¹ A merger is not favoured in equity, and is never allowed unless for special purposes, and to promote the intention of the party. It is only in those cases where it is perfectly indifferent to the party in whom the interests are united whether the charge should or should not subsist, that in equity the term is merged.²

§ 349. In a suit to foreclose a mortgage, one who claims adversely to the title of the mortgagor, cannot properly be made a party defendant, for the purpose of trying the validity of such adverse claim or title. So far as mere legal rights are concerned, upon a bill of foreclosure, the only proper parties to the suit are the mortgagor and mortgagee, and those who have acquired rights or interests under them, subsequent to the mortgage.³ No one can be admitted to defend who would not be prejudiced by the judgment; consequently, he who may come in as a terre tenant must have an estate from the incumbrancer, which might be bound by the incumbrance, whether judgment, mortgage, or recognisance.⁴ Strictly speaking, only the debtor's subsequent grantee of the fee simple is a terre tenant.⁵

¹ *Huston v. Wickerham*, 8 Watts, 523.

² *Dougherty v. Jack*, 5 Watts, 458; *Forbes v. Moffit*, 18 Ves. 394.

³ *Corning v. Smith*, 2 Seld. 82; *Eagle Fire Co. v. Lent*, 6 Paige, 637.

⁴ *Catlin v. Robinson*, 2 Watts, 379.

⁵ *Mitchell v. Hamilton*, 8 Barr, 491.

CHAPTER XIX.

ASSIGNMENTS.

§ 350. WE have already, under the head of constructive fraud,¹ had occasion to consider under what circumstances assignments, in trust for the benefit of creditors, (which comprise the most extensive of this class of trusts,) will be deemed fraudulent or *bonâ fide*.² Independently of the acts of assembly prohibiting preferences in assignments, there is no doubt of the right of a debtor in failing circumstances to prefer one creditor to another, or even to stipulate for a release on the part of the creditors coming in under the assignment.³ And these statutes operate no further than to forbid preferences in and by the instrument by which the debtor surrenders to his creditors all dominion over his property:⁴ whilst a man retains dominion of his property he may incumber and convey it as he pleases, if not directly forbidden by law, and prefer such creditors, by payment or transfer, as he chooses.⁵

§ 351. When the assignment has been accepted by the

¹ Ante, § 111.

² A general voluntary assignment, valid by the laws of the state where it was made, though void in another, will carry property in that other, against an attaching creditor. *Caskie v. Webster*, 2 Wall. Jr. 131.

³ *Cameron v. Montgomery*, 13 S. & R. 132; *Livingston v. Bell*, 3 Watts, 201.

⁴ *Worman v. Wolfersberger*, 7 Harris, 59; *Breading v. Boggs*, 8 Harris, 33; *Hutchinson v. M'Clure*, Ibid. 63.

⁵ *Blakey's Appeal*, 7 Barr, 451.

assignee, he becomes a trustee for the creditors, and chancery will compel the execution of the trust for their benefit. The creditors, who are the *cestuis que trust*, having acquired an equitable interest, are regarded as the persons beneficially interested in the thing which is the subject of the trust; and the trustee, after an acceptance of the conveyance for the purposes of the trust, cannot divest himself of the legal estate by a mere refusal to carry the trust into execution, or withdraw from its support without the consent of all the parties interested.¹ Nor will any subsequent fraudulent dealings between the assignor and assignees have the effect of re-vesting the assigned property in the assignor, or have a retroactive effect, so as to avoid the assignment.² But in order to protect the property from execution, it is necessary that there should be a delivery of the instrument to constitute it a deed. To give it instant operation, does not require it to be put immediately into the hands of the assignee; but it is indispensable to its effect, that the assignor should part with it by putting it into a course of transmission to him, either by delivery of it to a messenger, or by a deposit of it in the post office.³

§ 352. It is a well known rule of the common law, that no possibility, right, title, or thing in action, can be granted to a third person. But courts of equity will support assignments, not only of *choses in action*, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements be fairly entered into, and it would not be against public policy to uphold

¹ Seal v. Duffy, 4 Barr, 277-8; Klapp v. Shirk, 1 Harris, 592. See Adams' Eq. 31; Watson v. Bagaley, 2 Jones, 164; Brooks v. Marbury, 11 Wheat. 78.

² Klapp v. Shirk, ut supra.

³ M'Kinney v. Rhoads, 5 Watts, 344-5.

them.¹ Indeed, it is no more than the familiar principle, that he who executes a conveyance, on valuable consideration, purporting to pass a title before it is in him, will be bound to make it good whenever he acquire it. Such a conveyance is liberally interpreted as an agreement.² On this principle, an assignment of freight to be earned in future, will be upheld, and enforced against the party from whom it becomes due.³ Where a person, having a demand due him, assigns parts of it to different persons, to secure the payment to them of specific sums, in succession, a court of equity has jurisdiction of a suit by one of the assignees, to collect his part of the demand.⁴

§ 353. It was formerly held, that such assignments of reversionary interests, though valid in equity, would not generally be carried into effect in favour of mere volunteers, but only in favour of persons claiming for a valuable consideration.⁵ But in the recent case, of *Keke-wich v. Manning*,⁶ a more liberal and enlightened view of the law upon this subject was taken. And it is now held, that where the deed of assignment is complete in form, and not a mere agreement or executory instrument, no valuable consideration is necessary to support it. To treat an actual assignment by deed as a mere agreement, was a device resorted to, in the earlier efforts to get rid of the legal doctrine, that no possibility, right, title, or thing in action should be granted or assigned to stran-

¹ *Field v. The Mayor of New York*, 2 Seld. 187. Though a mere possibility cannot be directly granted at law, yet it may be, by release, devise, or estoppel, and is directly assignable in equity, and therefore, at law, in Pennsylvania. *M'Clure v. M'Clure*, 7 Leg. Int. 195; *Smilie's Estate*, 10 Harris, 134.

² *Wilson's Estate*, 2 Barr, 330. See *Vint v. King*, 2 Am. L. R. 721.

³ *Field v. The Mayor of New York*, 2 Seld. 187.

⁴ *Ibid.*

⁵ 2 Story's Eq. § 1040 c.

⁶ 12 Eng. L. & Eq. 120.

gers; but according to the modern doctrine, if the deed of assignment be a perfect instrument, there is no room for the argument against its effectiveness, founded on the doctrine that an incomplete gift is invalid in equity.¹ Whatever may be the rule against volunteers, it does not apply to the case of one who, in the language of a court of equity, is termed a *cestui que trust*, claiming against his trustee; for that which is considered by this jurisdiction a trust, may certainly be created gratuitously; so that the absence of consideration for its creation, is in general absolutely immaterial.²

§ 354. In order to constitute an assignment of a debt, or other *chose in action*, in equity, no particular form is necessary: an equitable assignment may be made by mere delivery; or, without delivery, by words of grant, or of authority; by the most informal appropriation *in pais*, or the execution of the most formal conveyance. Every thing, in short, which shows an intention to transfer an interest of any description, and a sufficient cause or consideration for the transfer, will operate as an assignment in equity,

¹ Voyle v. Hughes, 23 Eng. L. & Eq. 272-5.

² Kekewich v. Manning, 12 Eng. L. & Eq. 127. See Nesmith v. Drum, 8 W. & S. 10. It is no doubt well settled, that equity will not enforce an *executory* trust in favour of volunteers. Kennedy's Executors v. Ware, 1 Barr, 450. A consideration of some sort is as necessary to such an agreement as to any other. Whitehill v. Wilson, 3 Penn. R. 413. But it is equally well settled, that where the trust is actually created, no consideration to support it is necessary: whilst equity refuses to enforce a contract to *create* a trust, without a valuable consideration, it enforces an executed contract with as much alacrity as the law would enforce it. Dennison v. Goehring, 7 Barr, 179. It was at one time doubted, by high authority, (Lord Hardwicke, in Bagshaw v. Spencer, 1 Ves. 152) whether every trust be not executory in its character, because equity must be invoked to give effect to the trust; a position, subsequently however, abandoned by him, in Exel v. Wallace, 2 Ves. 323. In an executed trust, the uses are clearly defined, and the limitations certain and final; but in executory trusts, it is otherwise; the settlement of the uses requiring the intervention of a chancellor to mould them into form and shape, conformably to the intention of the grantor. Greenfield's Estate, 12 Leg. Int. 7.

whatever may be its apparent character at law.¹ Thus, a draft upon a particular fund in the hands of an attorney for collection, is an equitable assignment of it, though not accepted by the attorney. An equitable assignment is an agreement in the nature of a declaration of trust, which a chancellor never hesitates to execute when it has been made on a valuable, or even good consideration.² After such assignment, the fund will not be liable to attachment for the debt of the assignor;³ and payment to the original creditor, after notice of the assignment, would constitute no defence to a suit by the assignee.⁴ An assignment of a promissory note transfers to the holder the rights of the assignor, at a price presumed to be no more than equal to the value of the claim against the maker, taking into consideration his character for punctuality and his ability to pay. On such a transfer the assignor is responsible for nothing but the genuineness of the claim.⁵

§ 355. It is a principle of equity, settled by many decisions, that the assignment of a debt carries with it all the creditor's securities for it; and the assignee will be entitled to the full benefit of such securities, unless it be otherwise agreed between the parties.⁶ Thus, the assignee of one of several obligations secured by a mortgage, acquires an equitable interest in the collateral security of the mortgage *pro tanto*; he is a purchaser of all the securities of his assignor, and of all his remedies;⁷ and this, though the assignee were not aware of the ex-

¹ *M'Tree v. Guy*, 11 Leg. Int. 91.

² *Nesmith v. Dunn*, ut supra.

³ *Ibid.*; *King v. Gorsline*, 4 Cr. C. C. 150.

⁴ *Field v. The Mayor of New York*, 2 Seld. 179.

⁵ *Lyons v. Divelbis*, 10 Harris, 189. And see *Gompertz v. Bartlett*, 24 Eng. L. & Eq. 156; *Gurney v. Womersley*, 19 Jurist, 329; s. c. 3 Am. L. R. 502.

⁶ *Foster v. Fox*, 4 W. & S. 94; *Fitzsimmons' Appeal*, 4 Barr, 251; *Bank v. Fordyce*, 1 Barr, 455.

⁷ *Roberts v. Halstead*, 9 Barr, 34-5.

istence of the mortgage, at the time he purchased.¹ But the right of an assignee to have the ancillary securities of the debt, is only an equity resulting from a presumption of intention that they should pass as accessories of the principal; and it may consequently be rebutted by parol evidence that they were to be retained. Parol evidence is indisputably proper to rebut a presumption or an equity. A right to the benefit of the concomitant securities, is an equity which can be enforced only by a chancellor; and an agreement to waive it ought equally to be enforced by him.²

§ 356. In England and some of our sister states, there is a check to the power of alienation of a right or interest in land, taken from the statute of 32 Hen. VIII. ch. 9, against selling pretended titles. It is there held, that every grant of land, except a release, is void, if at the time the lands be in the actual possession of another person, claiming under a title adverse to that of the grantor; but this doctrine does not prevail in Pennsylvania.³ From the equality of condition of persons in this country, there is no danger of maintenance from the interference of powerful individuals, and the abundance and cheapness of land, rendered it necessary, at an early period, to admit of its transfer with almost the same facility as personal property.⁴ It was chiefly on the ground of champerty and maintenance, that the courts of common law refused to recognise the assignment of debts and other rights in action; though the same doctrine does not prevail in equity. And it is well settled

¹ *Betz v. Heebner*, 1 Penn. R. 280; *Cathcart's Appeal*, 1 Harris, 421.

² *Bank v. Fordyce*, 9 Barr, 278-9.

³ *Cresson v. Miller*, 2 Watts, 275; *Humes v. M'Farlane*, 4 S. & R. 435; *Girard v. City of Philadelphia*, 2 Wall. Jr. 306; *Dewitt v. Eldred*, 4 W. & S. 419. The law against maintenance has never been adopted in this state. *M'Kissick v. Pickle*, 4 Harris, 149-50.

⁴ *Steover v. Whitman*, 6 Binn. 421.

by a numerous train of decisions, that in this state a party may purchase, by assignment, the interest of another in a contract, or other security, which is the subject of a pending action.¹

§ 357. There are, however, limits to this doctrine. Thus, a mere right of action for a personal tort, is not assignable;² nor is a bare right to file a bill in equity for a fraud committed upon the assignor.³ Indeed, it has been laid down as a general rule, that where an equitable interest is assigned, in order to give the assignee a standing in a court of equity, the party assigning such right must have some substantial possession, and some capability of personal enjoyment, and not a mere naked right to overset a legal instrument, or to maintain a suit.⁴ Thus, where a party assigns his whole estate, and afterwards makes an assignment generally of the same estate to another person, a court of equity will not sustain a bill by the second assignee to set aside the first assignment as fraudulent and void, the assignor himself not joining in the prayer for relief.⁵ In this state, however, the trustees of an insolvent debtor may recover property fraudulently transferred by him prior to his discharge under the insolvent laws.⁶ And it may be observed, that the mere fact that a claim is disputed, will not forbid its transfer or assignment, nor will public policy avoid such a sale, simply because it may become necessary in the assignee to set aside the fraud of the debtor, in order to effectuate his purchase.⁷

¹ See 1 Wh. Dig. 929.

² *North v. Turner*, 9 S. & R. 248.

³ *Prosser v. Edmonds*, 1 Younge & Coll. 481; *Morrison v. Deaderick*, 10 Humph. 342; 1 Pars. on Cont. 194.

⁴ 2 Story's Eq. § 1040 g.

⁵ *Prosser v. Edmonds*, 1 Younge & Coll. 481; *Morrison v. Deaderick*, 10 Humph. 342.

⁶ *Moncure v. Hanson*, 3 Harris, 385; *Thomas v. Phillips*, 9 Barr, 355.

⁷ *Calcote v. Stanton*, 3 Am. L. R. 48; *Hoyt v. Thompson*, 1 Seld. 347.

CHAPTER XX.

WILLS AND TESTAMENTS.

§ 358. WE will now pass to the consideration of trusts created by last wills and testaments; such as trusts for securing the rights of infants and married women, for the payment of debts and legacies, for the sale of real estate, or for objects of charity. Many trusts also arise under wills by implication of law: but however created they are cognizable in a court of equity; and, in this state, the various orphans' courts have concurrent jurisdiction in all cases of testamentary trusts.

§ 359. In the first place, as we have already seen,¹ trusts are often created by will, without the designation of any person to execute them. Now it is a settled doctrine in courts of equity, that a trust shall never fail for want of a proper trustee; and accordingly, our courts are authorized to appoint a trustee, "in any case in which a trust shall have been created and no person appointed, either by name or description, to execute the same."² And by another statute it is provided, that "all powers, authorities, and directions, relating to real estate, contained in any last will, and not given to any person by name or description, shall be deemed to have been given to the executors thereof; but no such power, authority, or direction, shall be exercised or carried into effect by them,

¹ Ante, § 320.

² Purd. Dig. § 804.

except under the control and direction of the orphans' court having jurisdiction of their accounts."¹

§ 360. The same statute declares, that "the executors of the last will of any decedent, to whom is given thereby a naked authority only to sell any real estate, shall take and hold the same interests therein, and have the same powers and authority over such estate, for all purposes of sale and conveyance, and also of remedy by entry, by action or otherwise, as if the same had been thereby devised to them to be sold, saving always, to every testator, his right to direct otherwise."² This act converts the power into an interest, but it also restricts the interest to the limits of the power. It gives the executors the legal estate in the land, only for the purpose of effecting a sale, but not for the purpose of receiving and recovering the rents and profits; nor does it invest them generally with the control and management of the testator's real estate. The estate of the executors may, like that of trustees to protect contingent remainders, attend on that of the heirs until an occasion occurs which requires its exercise, and then come into operation with full force and efficiency; or it may be viewed in the light of an executory devise, or springing use, which has no being until the occurrence of the event on which it is limited.³ The like powers are given to a surviving or acting executor; and to an administrator with the will annexed.⁴

§ 361. No statute of Pennsylvania, however, empowers an administrator with the will annexed, to execute a trust of land confided to an executor by title or by name, for any other purpose than to sell for payment of debts.

¹ Act 24 February 1834, § 12; *Ibid.* 194.

² *Blight v. Wright*, 12 Leg. Int. 62.

³ *Ibid.* 194.

⁴ *Purd. Dig.* 194-5.

By force of the act of 1834, he may execute a power to sell, in order to bring the land into a course of administration, but not to execute a trust for a collateral purpose; for instance, to manage the property and invest the proceeds for accumulation; or to maintain the widow and children; or to turn the land into money for the convenience of partition; or to exercise any discretionary power confided to his predecessor in the administration for his personal fitness and fidelity. For purposes purely administrative, the statute gives the devise of a power, the effect of a devise of the title, and puts an administrator with the will annexed on a footing with a surviving executor, but not on a footing with a testamentary trustee.¹

§ 362. The intent of the statute was, to prevent the object of a power given to several, from being frustrated by the death or renunciation of one or all of them; not to vest the execution of an unofficial trust in a stranger to the testator's confidence. True it is, that for the purpose of selling, or otherwise, the act gives a surviving executor, and consequently an administrator with the will annexed, the same interest in, and power over the estate, as all the executors might have exercised for the same purpose; but as trusts survive on the principles of joint-tenancy, the section seems to have been enacted, as to them, *ex majori cautela*; or for such as are annexed to an ordinary administration, not to those which might as well have been placed elsewhere. On the foot of the maxim, that when different rights meet in the same person, they are to be treated as if they were in different persons; courts of equity, recognising the union of executor and trustee in the same individual, *reddendo sin-*

¹ *Ross v. Barclay*, 6 Harris, 183-4.

gula singulis, have considered real estate directed to be sold for payment of debts, as equitable assets, and consequently as the subject of a trust. Now the object of the statute was to make lands legal assets in all cases; not to confound the distinction between trusts and powers. With us land has perhaps always been legal assets, and when a trust is created to bring it into a course of administration, it is proper that an administrator should succeed to the execution of it; but the statute was not intended for a trust unconnected with an executor's ordinary duties.¹

§ 363. On the same equitable principle, that a trust shall not fail for want of a proper trustee, it is held, that where a power of appointment is given by will, to distribute property among certain classes of persons, as among relations of the testator, the power is to be treated as a trust; and if the party die without executing it, a court of equity will distribute the property among the next of kin.² Where a power is in the nature of a trust, that is, where its execution is essential to give effect to rights of property, vested or intended to be vested in others, its fulfilment is regarded as a duty which may be compelled; and, of course, the subject will, in the meantime, be impressed with the incidents of equitable conversion. But there is no room for the operation of this rule where the beneficiaries are themselves clothed with the privilege of decision, not to defeat the estate of any one of them, but to determine the shape in which it shall vest in possession; in such cases no conversion takes place until the power be actually exercised.³

§ 364. It is a general rule that, in the execution of a

¹ Ibid. 184.

² 2 Story's Eq. § 1061.

³ Nagle's Appeal, 1 Harris, 263.

power, the donee of the power must clearly show that he means to execute it, either by a reference to the power, or to the subject matter of it; for if he leave it uncertain whether the act be done in execution of the power or not, it will not be construed to be an execution of the power.¹ Three classes of cases have been held to be sufficient demonstrations of an intention to execute a power. 1. Where there has been some reference to the *power* in the instrument of execution. 2. Where there has been a reference to the *property* which was the subject on which it was to be executed. 3. Where the instrument of execution would have no operation whatever, except as an execution of the power.² Where the donee of a power to sell land possesses also, an interest in the subject of the power, a conveyance by him, without actual reference to the power, will not be deemed an execution of it, except there be evidence of an intention to execute it; but where the donee has no estate in the premises, and his conveyance can only be made operative by treating it as an exertion of the power to sell, it will be so considered.³

§ 365. A general power of appointment is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whomsoever he pleases. He has an absolute disposing power over the estate, and may bring it into the market whenever his necessities or wishes lead him to do so. But a power to sell implies a power to mortgage,

¹ 2 Story's Eq. § 1062 a.

² *Wetherill v. Wetherill*, 6 Harris, 271; *M'Konkey's Appeal*, 1 Harris, 259.

³ *Jones v. Wood*, 4 Harris, 42-3; *Hay v. Mayer*, 8 Watts, 209.

a mortgage being a conditional sale, and it would seem, for the same reason, that a power to *charge* will not imply a power to mortgage.¹ It is a settled rule in equity, that powers appendant may be exercised at different times, over different portions of the land made subject to them, and also over different portions of the estate, the only consequence of a partial execution, as to the estate, being to postpone the right of possession under a future exercise of the power over the residue of the estate, until the termination of the estate created in the first instance; but this does not suspend the right to execute the residue of the power, and perfect the title to the estate granted. Thus, a power to sell, mortgage, or devise in fee, is not exhausted by mortgaging the estate, but the donee may devise the same, subject to the mortgage.²

§ 366. A power to appoint by will the proceeds of land directed to be sold, is not well executed by a will devising the land itself; because no power is thereby given over the *corpus* of the estate, but it is a limited one, and expressly confined to the proceeds.³ It is, however, by no means a necessary result of this doctrine, that a power to appoint the lands is not well executed by a direction to sell and an appointment of the proceeds. A power over the *corpus* of the estate is a more general one, and may well include an authority to direct a sale. It was accordingly ruled, by Sir William Grant, M. R., in *Kenworthy v. Bute*,⁴ that a power of appointing real

¹ *Lancaster v. Dolan*, 1 Rawle, 248.

² *Asay v. Hoover*, 5 Barr, 36. A power to appoint, by deed or will, does not constitute two separate and distinct powers, but is a single power, with a restriction on its exercise, requiring it to be exercised by one or other of two instruments, but leaving to the donee the option, within the limits of that restriction, to choose which instrument he will use in exercising the power. *Evans v. Saunders*, 19 Jurist, 265; s. c. 3 Am. L. R. 509.

³ *Woods' Estate*, 1 Barr, 370.

⁴ 6 Ves. Jr. 793.

estate, is well executed by a devise to trustees to sell, and an appointment of the money produced by the sale. And he there remarks, that the cases of *Thwaytes v. Dye*,¹ *Roberts v. Dixall*,² and *Long v. Long*,³ must have been ill decided, if it be true that, substantially, a power to appoint land can be executed in no other way than by limiting the land itself. The principle of these cases has been since recognised in *Trollope v. Linton*,⁴ where it was held, that a power to appoint lands to children for such estates, and in such manner and form as the donee should, by deed or will, appoint, was well executed by an appointment to trustees for a term of five hundred years, upon trust to raise portions for the younger children; and that the words, "in such manner and form," authorized him to give equitable interests to the children.⁵

§ 367. Money appointed by will, under a general power to appoint for any purpose, is held by English chancellors to be equitable assets for payment of the appointor's debts; but such is not the doctrine of the courts of Pennsylvania. Such a fund is certainly not legal assets, for it does not go into the executor's hands in a course of administration. It could not be a part of the appointor's effects while he was living, and it cannot be so when he is dead; for a title which did not vest in him when he had a capacity to take, could not vest in him when his capacity was lost. Yet an English chancellor intercepts the money on its way to the appointee, and applies it to the appointor's debts, not as an actual part of his effects, but on what, according to the chancellor's notion of jus-

¹ 2 Vern. 80.

² 2 Eq. Cas. Ab. 668.

³ 5 Ves. Jr. 445.

⁴ 1 S. & S. 477.

⁵ The same doctrine was held in *Palmer v. Wheeler*, 2 Ball & B. 28; *Bullock v. Flodgate*, 1 Ves. & B. 478. And see Sugden on Powers, 510; Chance on Powers, § 1285.

tice, ought to have been made so for the benefit of his creditors. There is such flagrant injustice in applying the bounty of a testator to the benefit of those for whom it was not intended, that the mind revolts from it. An appointee derives title immediately from the donor of the power, by the instrument in which it was created; and consequently not under, but paramount to the appointor, by whom it was executed: by reason of which it is impossible to conceive that the appointor's creditors have an equity. A man who is employed to manage the conduit-pipe of another's munificence, is authorized by a general power of disposal to turn the stream of it to any person or point within the compass of his discretion; and his creditors have no right, in justice or reason, to control him in performing his function, because it was not assigned to him as their trustee. It is the bounty of the testator, and not the property of his steward, that is to be dispensed.¹

§ 368. In the administration or distribution of assets, it is sometimes difficult to say who are the parties entitled to take, and to point out the exact limitation of their respective interests. In such cases courts of equity exercise a beneficial jurisdiction, by which the cross-equities, and the conflicting claims of the various claimants, are settled and equitably adjusted. Embarrassing questions also arise in respect to the persons who are entitled to take under words of general description. As, for example, where there was a bequest of a residue to a daughter, and at her death, within age, to the testator's "nearest relations or connections, according to the laws of the commonwealth;" it was held, that these words did not include his widow.²

¹ *Com. v. Duffield*, 2 Jones, 279-80.

² *Storer v. Wheatley*, 1 Barr, 506.

§ 369. It frequently happens, that an absolute gift of property is made to a person by will, accompanied by expressions, indicating a wish on the part of the testator, that certain other parties should participate in the beneficial enjoyment. The strong disposition of the courts to give effect to the intentions of testators gave rise, in England, to a species of trusts founded on expressions of this nature, and differing in some respects from absolute trusts. These recommendatory trusts were enforced in favour of the particular objects or purposes thus designated, although they might be insufficient to impress the gift with the character of a trust generally.¹ After some conflict of decision, this doctrine has been much modified in Pennsylvania, and it is here settled that words in a will expressive of desire, recommendation, and confidence, are not words of technical, but of common parlance, and are not, *primâ facie*, sufficient to convert a devise or bequest into a trust; and that the old Roman and English rule on this subject is not part of the common law of Pennsylvania. But such words may amount to a declaration of trust, when it appears from other parts of the will that the testator did not intend to commit the estate to the devisee or legatee, or the ultimate disposition of it to his kindness, justice, or discretion.²

§ 370. It will be proper here, to consider the doctrine of courts of equity respecting election and satisfaction,

¹ Hill on Trustees, 71. See *Lomax v. Ripley*, 19 Jurist, 272; s. c. 3 Am. L. R. 510.

² *Pennock's Estate*, 8 Harris, 268, 280. The point to be decided in all such cases is, whether, looking at the whole context of the will, the testator has meant to impose an obligation on his legatee to carry his express wishes into effect; or whether, having expressed his wishes, he has meant to leave it to the legatee to act on them or not at his discretion. *Williams v. Williams*, 5 Eng. L. & Eq. 49-50.

which, in practice, arises frequently, although not exclusively, in cases of wills. Election, in the sense here used, is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both.¹ It is a conclusion in equity, that where any person, having a claim on a man's estate independently of him, and also a claim on his estate under his will, which claims are repugnant to each other, pursues the former, the latter is thereby waived or abandoned.²

§ 371. This springs from the well settled equity that prohibits claims in repugnant rights, and as a consequence says, that he who claims an estate or other advantage by devise, shall not be permitted to disappoint any part of the will, but is bound to acquiesce in all its provisions.³ "No man," says Lord Alvanley, "shall claim any benefit under a will, without confirming, so far as he is able, and giving effect to every thing contained in it, whereby any disposition is made, without reference to the circumstance whether the testator had knowledge of the extent of his power or not."⁴ Thus, if one devise land entailed, or under settlement, and also lands in fee simple, it is on the implied condition that each party shall acquit and release the other, and one who takes the fee simple under the will, cannot claim by force of the settlement, or as heir in tail.⁵ Lord Talbot thus states the doctrine:—"Where a man undertakes to devise what he has no

¹ 2 Story's Eq. § 1075.

² *Cauffman v. Cauffman*, 17 S. & R. 24.

³ *Preston v. Jones*, 9 Barr, 459; *Randall v. Silverthorn*, 4 Barr, 176.

⁴ *Whistler v. Webster*, 2 Ves. Jr. 367.

⁵ *Noyes v. Mordant*, Gilb. Eq. R. 2; s. c. 2 Vern. 581; *Anon.* Gilb. Eq. R. 15.

power over, upon the supposition that his will will be acquiesced in, chancery will compel the devisee, if he will take advantage of the will, to take entirely and not partially, under it, there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition the deviser has made."¹ And it is immaterial, whether the testator believed he had a right to dispose of the estate, over which he had no control, or intended to assume an arbitrary power.²

§ 372. Where there has been an acceptance under the will, it operates to estop the accepting party from denying the title of the devisee of his own estate; for an affirmation of part of the will by entering upon the enjoyment of a benefit conferred by it, is a tacit repudiation of all rights and claims inconsistent with the other dispositions made by it, at least to the extent of the advantage derived under it.³ By electing to take the property devised, he thereby, *ipso facto*, releases all his right to that given to other devisees, as completely as if he had executed the most formal deed that could be devised and drawn for that purpose.⁴

§ 373. This doctrine of election is not confined to wills, nor is it exclusively enforced in courts of equity. In courts of law, as well as of equity, no one can claim under a deed, without claiming under the whole of it, or take one clause, and reject the rest: the whole must be confirmed, or the whole abandoned.⁵ In general, the law is, that a grantor is estopped by his own deed to say he had no interest, when by a subsequent deed

¹ *Streatfield v. Streatfield*, Cas. Temp. Talbot, 182-3; *Hamilton v. Buckwalter*, 2 Yeates, 398; *Wilson v. Bigger*, 7 W. & S. 125. And see also *Blake v. Bunbury*, 1 Ves. Jr. 523.

² *Stump v. Findlay*, 2 Rawle, 174.

⁴ *Plummer v. Neile*, 6 W. & S. 93.

³ *Preston v. Jones*, 9 Barr, 460.

⁵ *Stump v. Findlay*, 2 Rawle, 174.

he acquires a title. As where an heir apparent, having the hope only of succession, conveys, during the life of his ancestor, an estate which afterwards descends to him, he is estopped to say that he had no interest at the time of his grant. These estoppels run with the land into whatever hand it comes. As, if A. make a lease by indenture, of black acre, and after purchase and convey it to B.; B. is bound by this estoppel.¹ These estoppels are founded in law, honour, and conscience, and the true reason is, that a man having received a benefit in one character, (the value of the thing) shall not afterwards recover the thing itself, in another character. This legal and equitable principle runs through all the transactions and contracts of life. As, in an action by the assignee of a patentee against the patentee himself, he is estopped from saying it is not a new invention, because he has received the benefit of it as such, and though all the world else may show this, he shall not be permitted to do it.²

§ 374. In the event of an election to take against the will, a court of equity will treat the substituted devise as a trust in the devisee for the benefit of the disappointed claimants, to the extent of their interest therein. Chancery, in such case, would sequester the thing devised, to make compensation and satisfaction to the disappointed devisee.³ “If,” said Sir William Grant, “the will be in other respects so framed as to create a case of election, then, not only is the estate given to the heir under an implied condition that he shall confirm the whole of the will; but, in contemplation of equity, the testator means,

¹ *Trevannion v. Lawrence*, 2 Salk. 266.

² *M'Pherson v. Cunliff*, 11 S. & R. 427.

³ *Cauffman v. Cauffman*, 17 S. & R. 25.

in case the condition shall not be complied with, to give the disappointed devisees, out of the estate over which he had a power, a benefit correspondent to that which they are deprived of by such non-compliance. So that the devise is read, as if it were to the heir absolutely, if he confirm the will, if not, then in trust for the disappointed devisees, as to so much of the estate given to him as shall be equal in value to the estate intended for them.”¹

§ 375. In such case, however, there is not an absolute forfeiture of the whole of the benefit proposed to him, but of so much only as is requisite to compensate, by an equivalent, those claimants whom he has disappointed; so that he may entitle himself to the surplus. By the doctrine of sequestration to make compensation, the intention of the testator, so far as circumstances will admit, is effected; by the doctrine of forfeiture, that intention, in many cases, would be defeated. If, in Pennsylvania, the forfeiture would not be exacted absolutely, still it would be a forfeiture, until the party made compensation and satisfaction. But though the usual course, in England, is to resort to a court of equity, because at law the party cannot be put to elect, yet even courts of law apply the principle of election; and it is a good defence in a court of law, where the party has acted upon it in such a manner as to be concluded by what he has done; that is, to have elected. But if it be a matter only in equity, equity would grant relief in case of a recovery at law in an action of dower, where the devise was in bar of dower,

¹ *Welby v. Welby*, 2 Ves. & B. 190-91. The mere joinder by a legatee, having a paramount estate, in a conveyance by the devisee and other owners, will not preclude her claiming a legacy under the will which affected to dispose of the land. *Thompson v. Thompson*, 7 Barr, 78.

(as all devises here are, by positive law) and carry into execution the trusts of the will.¹

§ 376. A receipt of a legacy under the will, has never been held to be a forfeiture of the right to the thing which is acquired by the legatee, through a title paramount to the will, or otherwise than under it. It has been considered as, at most, only creating an obligation to indemnify the disappointed claimant, to the extent of the value of what was designed for him by the will, out of that which is thereby given to the party electing, if it should be sufficient; and also, as authorizing a court of equity, with a view to secure such indemnity, to sequester that which is elected to be so taken under the will. In no case, however, does election create an absolute forfeiture, when the value of the thing elected to be taken under the will is more than sufficient to make a compensation to the disappointed party, equal to his loss; for if there should remain a surplus beyond that, the party electing is entitled to it.²

§ 377. The doctrine of equitable election is founded on the intention of the author of the instrument, and must be collected from the instrument itself. When the intention, necessary to raise the question of election, is clearly expressed or necessarily implied, the party to whom a benefit is given by the instrument, but claiming a right adverse thereto, may either be compelled to make his election, or otherwise to make compensation out of what is thereby given to him. But unless the intention be so expressed or implied, he cannot be put to his election, nor called on to make compensation. The heirs at law of a testator will not be put to make their election,

¹ *Cauffman v. Cauffman*, 17 S. & R. 26; *Lawrence v. Lawrence*, 2 Vern. 365-6.

² *City of Philadelphia v. Davis*, 1 Wh. 511.

when the will is susceptible of a construction that does not require it. Thus, where a testator gave certain legacies to his heirs, and devised the residue of his estate in trust for the foundation of a charity, and added, that it was his intention to pass by his will any real estate that he might thereafter purchase; it was held, that the heirs, who had accepted their legacies, were not thereby estopped from recovering real estate purchased by the testator after the publication of his will. Where the land cannot pass by the will the legatee cannot be called on to make an election.¹

§ 378. In Pennsylvania it is provided, by statute,² that a devise or bequest by a husband to his wife of any portion of his estate or property, shall be deemed and taken to be in lieu and bar of her dower in the estate of such testator, in like manner as if it were so expressed in the will, unless such testator shall in his will declare otherwise. The widow, however, may elect either to take the estate or property so devised or bequeathed, or her dower in his lands and her share of his personal estate, as a distributee under the intestate laws. And in every such case, the orphans' court may, on the application of any person interested in the estate of the decedent, issue a citation, at any time after twelve months from the death of the testator, to any such widow, to appear at a certain time, not less than one month thereafter, in the said court, to make her election, either to accept such devise or bequest in lieu of dower, or to waive such devise or bequest and take her dower; of which election a record is to be made, which will be conclusive on all parties. If the widow neglect or refuse to appear upon such citation, then, upon due proof

¹ City of Philadelphia v. Davis, 1 Wh. 490, 502, 510.

² Purd. Dig. 266.

to the court of the service thereof, such neglect or refusal will be deemed an acceptance of the devise or bequest, and a bar of dower; of which also a record is to be made.¹

§ 379. The widow's election to take under the will of her husband, although not made in the orphans' court, under the provisions of the act of assembly, will estop her from claiming dower.² If a widow who is acquainted with all the facts, but is wholly unaware that by law she has a right of dower, be induced by one who knows the law, and at the same time knows her ignorance of it, to release or assign it, for a totally inadequate consideration, she ought to be relieved. But where the error is her own, and no imposition has been practised, nor any fraudulent advantage taken, her acts done under the influence of it, are as binding upon her as if she knew the law perfectly;³ and an election once made is irrevocable.⁴

§ 380. The party is not bound to make any election until all the circumstances are known, and the state, condition, and value of the funds are clearly ascertained; for, until so known and ascertained, it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him in reason and justice.⁵ And therefore a widow is entitled, in order that she may be enabled to make her election, to a fair account of the personal estate by the executor.⁶ The doctrine of election applies to the interests of persons under disabilities, as infants and married women; nor is it material whether those interests be immediate or remote, vested or contingent, of value or not of value;

¹ See *Melizet's Appeal*, 5 Harris, 453-4.

² *Cauffman v. Cauffman*, 17 S. & R. 16; *Light v. Light*, 9 Harris, 407.

³ *Light v. Light*, 9 Harris, 412.

⁴ *Baney v. Killmer*, 1 Barr, 35.

⁵ 2 Story's Eq. § 1098.

⁶ *Melizet's Appeal*, 5 Harris, 449-50.

and, after a great lapse of time, an election will be presumed.¹

§ 381. By the act of 4th May 1855,² the same right of election is secured to a husband, under the will of his wife, made in pursuance of the act of 1848; and the power of a married woman to bequeath or devise her property by will, is thereby restricted, as regards her husband, to the same extent as the husband's power so to dispose of his property is restricted, as regards the wife; namely, so that any surviving husband may, against her will, elect to take such share and interest in her real and personal estate, as she could, when surviving, take, against his will, in his estates; or otherwise, only her real estate as tenant by the curtesy. This act, however, does not affect the right or power of a married woman, by virtue of any authority or appointment contained in any deed or will, to grant, bequeath, or devise, as heretofore, any property held in trust for her sole and separate use.

§ 382. We will now proceed to the consideration of the kindred doctrine of satisfaction; which may be defined, in equity, to be the donation of a thing, with the intention, expressed or implied, that it is to be an extinguishment of some existing right or claim of the donee. It usually arises in courts of equity as a matter of presumption, where a man, being under an obligation to do an act, (as to pay money) does that by will which is capable of being considered as a performance or satisfaction of it, the thing performed being *ejusdem generis* with that which he has engaged to perform. Under such circumstances, and in the absence of all countervailing

¹ *Tiernan v. Roland*, 3 Harris, 451. So a married woman is bound by an estoppel. *Couch v. Sutton*, Sup. Court, 3 Pittsburgh Leg. J. 60.

² *Purd. Dig.* 1136.

equities, the ordinary presumption in courts of chancery is, that the testator has done the act in satisfaction of his obligation.¹

§ 383. The law presumes that every legacy is intended to be a clear gratuity;² but the rule prevails, in equity, that wherever a person, by his will, gives a legacy as great or greater than the debt he owes to the legatee, such legacy shall be a satisfaction of the debt, on the presumption that a man must be intended just, before he is bountiful, and that his intent is to pay a debt and not to give a legacy.³ The rule itself is not founded in reason, and often tends to defeat the bounty of testators, and able chancellors have thought it more agreeable to equity, to construe a testator to be both just and generous, where the interests of third persons are not affected. And courts of justice will now lay hold of slight circumstances to get away from the rule. Legacies are considered as gratuities, and are always construed favourably. If they be less than the sum due, payable on a contingency or a future day, in these and the like circumstances, they will be construed as additional bounties and not as satisfactions. And although the contingency do actually happen, and the legacy thereby becomes due, yet it shall not go in satisfaction of the debt, because a debt which is certain, shall not be merged or lost by an uncertain and contingent recompense. For whatever is to be a satisfaction of a debt, ought to be so in its creation and at the very time it is given, which such contingent provision is not.⁴

§ 384. The general rule is, that the legacy must be in all respects, *ejusdem generis*, to cause a satisfaction of

¹ 1 Jarman's Powell on Devises, 433, note 4; 2 Story's Eq. § 1099.

² Zeigler v. Eckert, 6 Barr, 13.

³ 1 Eq. Cas. Ab. 203; Cranmer's Case, 2 Salk. 508.

⁴ Byrne v. Byrne, 3 S. & R. 60-1.

the debt, and an apparent intention must appear in the will, that the testator meant it as such;¹ and therefore it is held, that a devise of land is not a satisfaction, or part performance, of an agreement to pay money.² The presumption may be rebutted, like any other presumption, by proof arising either on the face of the will, or *dehors*. It is not adduced to control the will, but to rebut a presumption from matter extrinsic to it. That parol evidence is admissible to rebut an equity, is an elementary principle, guarded from abuse by the consideration, that the court never decrees on the basis of it when the fact is at all in doubt.³

§ 385. Questions of satisfaction generally arise in three classes of cases: 1. In cases of portions secured by a marriage settlement. 2. In cases of portions given by will, and an advancement to the donee afterwards in the life of the testator. 3. In cases of legacies to creditors.⁴ The first class may be illustrated by a case in which a husband, by the marriage contract, bound himself to assure to the trustees of his intended wife, a sufficient real or personal estate to secure the payment of \$5000 for her sole use, in case she should survive him; or that he would, by his last will, within one year from the date of the obligation, bequeath to her such estate as should be fully adequate to the intended provision; he accordingly made a provision for her by will, and although not made within the year, it was held to be, to all intents and purposes, a performance, or part performance of the contract; and although the testator did not so declare in his will, it was to be presumed that the will was intended as a compliance with the condition of the bond.⁵

¹ *Ibid*.

² *Bryant v. Hunters*, 3 W. C. C. 53.

³ *Zeigler v. Eckert*, 6 Barr, 18-19.

⁴ 2 Story's Eq. § 1109.

⁵ *Bryant v. Hunters*, 3 W. C. C. 53-4.

§ 386. In regard to the second class, Lord Eldon observes, "that where a father gives a legacy to a child, the legacy coming from a father to his child must be understood as a portion, though it be not so described in the will; and afterwards advancing a portion to that child, though there may be slight circumstances of difference between the advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance, and the advance is therefore an ademption of the legacy; but a stranger giving a legacy is understood as giving a bounty, not as paying a debt; he must, therefore, be proved to mean it as a portion or provision, either on the face of the will, or if it may be, and it seems it may, by evidence, applying directly to the gift proposed by the will."¹ The presumed ademption may be destroyed or confirmed by the application of parol evidence of a different intention by the testator.²

§ 387. This doctrine equally applies, where the testator has placed himself *in loco parentis* to the legatee. Where the testator's assumption of the office of a parent is established, his legacy will be considered a portion, and a subsequent advancement will be an ademption, in all cases where it would be so if made by a natural father. In the extensive class of cases on this doctrine, to be found in the equity reports, the chief difficulty in its application seems to have arisen from the inquiry, what are circumstances sufficient to invest the testator with the assumed relation of parent to the legatee; and the

¹ Ex parte Page, 18 Ves. 135; Garrett's Appeal, 3 Harris, 212; Zeiter v. Zeiter, 4 Watts, 214.

² Biggleston v. Grubb, 2 Atk. 48; Ronnell v. Barnett, 3 Atk. 77; Trimmer v. Bayne, 7 Ves. 508; Robinson v. Whitely, 9 Ves. 577; Thelluson v. Woodford, 4 Madd. 420; Gill's Estate, 1 Pars. 141; Zeiter v. Zeiter, 4 Watts, 214.

evidence competent to prove that he placed himself in such character. Roper declares the test in such cases to be, whether the circumstances, taken in the aggregate, amount to moral certainty that a testator considered himself in the place of the child's father, and as meaning to discharge that natural obligation which it was the duty of a parent to perform. The assumption by a person of the relation of a parent to the legatee may be proved by parol, and is not required to be collected from the face of the will itself.¹

§ 388. It is provided by the intestate law of Pennsylvania, that "if any child of an intestate shall have any estate by settlement of such intestate, or shall have been advanced by him in his lifetime, either in real or in personal estate, to an amount or value equal to the share which shall be allotted to each of the other children of such intestate, such child shall have no share in the real or personal estate of such intestate; and if such settlement or advancement be to an amount or value less than the share to which he would otherwise be entitled, if no such advancement had been made, then so much only of the real or personal estate of such intestate shall be allotted to such child, as shall make the estate of all the children to be equal as near as can be estimated."²

§ 389. An advancement is an irrevocable gift by a parent, in his lifetime, to his child, on account of such child's share of the estate after the parent's decease.³ All such questions must depend on the intention of the parent in making the gift; and of this, the declarations of the parent at the time would be evidence, or the admissions of the children against themselves, at the time, or after-

¹ Gill's Estate, 1 Pars. 141.

² Purd. Dig. 454-5.

³ Hengst's Estate, 6 Watts, 87.

wards. If there be no evidence at all on the subject, then whether it was a gift or an advancement may be judged of by its amount and character.¹ As a general rule, money expended in the education of a child, is not presumed to be an advancement. The presumption is, that the parent makes these expenditures in discharge of his parental duties, and that all his children are treated with equality in this respect. But this presumption may be repelled by evidence.² If a parent purchase land in the name of his son, it will, *primâ facie*, be deemed an advancement.³ And an acquittance of a bond and mortgage given to husband and wife by the wife's father, is an advancement to the daughter.⁴ So, it may be shown that a deed for a money consideration was intended as an advancement beyond the nominal consideration.⁵ And in reference to this subject, it may be here remarked, that after some conflict of decision, it has been determined, that the orphans' court has exclusive jurisdiction in all cases of advancement.⁶

§ 390. The third class of cases, where a legacy is given to a creditor, has been already considered, in stating the general doctrine of satisfaction in equity.⁷ It may be observed, however, that where a creditor leaves a legacy to his debtor, it is not, *per se*, a discharge or release of the debt. But the presumption that no release was intended when a debt stands against a legacy may, like any other presumption, be repelled by proof, either on the face of the will, or *aliunde*.⁸

§ 391. In the case of a prior legacy followed by a

¹ King's Estate, 6 Wh. 373.

² Riddle's Estate, 7 Harris, 433; Lentz v. Hertzog, 4 Wh. 523.

³ Phillips v. Gregg, 10 Watts, 158.

⁴ Wentz v. Dehaven, 1 S. & R. 312.

⁵ Hayden v. Mentzer, 10 S. & R. 329.

⁶ Holliday v. Ward, 7 Harris, 485.

⁷ Ante, § 382-3.

⁸ Zeigler v. Eckert, 6 Barr, 19.

legacy of a later date, the question which arises is, whether the later legacy was intended to be identical with the first, so as to operate as a reiteration of the original gift. If it were so intended, and the intention be proved by admissible evidence, the first legacy is as obviously at an end, as if a man were to bequeath a particular horse, and were afterwards again to bequeath it to the same person. The construction put by law on the later legacy is, *primâ facie*, against its being meant as identical, and in favour of its being held an independent benefit. This construction, however, may be altered by a presumption of law to be raised by a comparison of the two gifts, of the motives respectively assigned for each, or by the relative position in which the parties stand.¹ As for example, if the testator connect a motive with both, and that motive be the same, the double coincidence will induce the court to believe that repetition and not accumulation is intended.

§ 392. Before closing this chapter there remains for our consideration another question, which most frequently arises in cases of testamentary trusts; namely, under what circumstances a purchaser from a trustee is bound to look to the due application of the purchase money. Where a trust is created by deed, it is customary to insert a proviso that purchasers shall not be under any such obligation. The doctrine is not universally true, that a purchaser, having notice of a trust, is bound to see that the trust is in all cases properly executed by the trustee. On the contrary, there are many qualifications and limitations of the doctrine in its actual application to sales both of personal and real estate.²

§ 393. To hold a purchaser from a trustee who has

¹ Adams' Eq. 103.

² 2 Story's Eq. § 1125.

power to sell, liable to the proper application of the purchase money, has nothing to recommend it to the courts of this country. Our policy is to render titles to land as little embarrassed as practicable; and hence, a Pennsylvania tribunal would lean against any extension of a doctrine which interferes with the convenient transmission of lands from hand to hand. Even in England, where feudal restraints on the convertibility of land into money, have not been entirely shaken off, the doctrine is by no means a favourite. Mr. Butler¹ seems to incline to the opinion that the admission of the doctrine has been more productive of inconvenience than real good; that it retards, and often absolutely impedes the progress of business, and is in other respects a useless expense. And Sir William Grant declares the doctrine to have been carried further than any sound equitable principle will warrant. "Where," says he,² "the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice. But where the sale is made by the trustee in the performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power; that is, to give a valid discharge for the purchase-money."³

§ 394. The general rule adopted by courts of equity is this; that where the trust is for the payment of debts generally, the purchaser is not bound to see to the application of the purchase-money, although he have notice of the debts. For a purchaser cannot be expected to see to the observance of a trust so unlimited and unde-

¹ Co. Litt. 290 b, note 1.

² *Balfour v. Welland*, 16 Ves. 156.

³ *Dalzell v. Crawford*, 1 Pars. 48-9; *Grant v. Hook*, 13 S. & R. 262.

fined. If the trust be of such a nature, that the purchaser can reasonably be expected to see to the application of the purchase-money—as if it be for the payment of legacies, or of debts scheduled or otherwise specified, he is bound to see that the money is applied accordingly. But he is not bound to see the money applied, where the trust is for the payment of debts *generally*, and also for the payment of legacies; because, to hold that he is liable to see the legacies paid would in fact involve him in the account of the debts, which must be first paid.¹ And the rule equally applies, where there is a devise for the payment of debts, and to distribute the surplus among children.²

§ 395. Even where the trusts are defined, and yet the money is not merely to be paid over to third persons, but is to be applied by the trustees to certain purposes, which require, on their part, time, deliberation, and discretion, it seems that the purchaser is not bound to see to the due application of the purchase-money. Whenever a trustee, empowered to sell, is at the same time authorized and required to re-invest the avails of the trust property, under the same trusts with which the original estate was clothed, the purchaser is discharged from all obligation to see to the proper application of the purchase-money, paid by him to the trustee; and it is difficult to perceive how it could practically be otherwise. Re-investments are eminently matters for the exercise of sound discretion. The failure of a due exercise of such discretion may involve the trustee in direct personal liability for a breach of trust. To coerce precipitate action by the trustee may be most deleterious to the trust fund; while to keep the purchaser in a state of suspended lia-

¹ *Grant v. Hook*, 13 S. & R. 262.

² *Cadbury v. Duval*, 10 Barr, 267-8.

bility, until such re-investment be properly made, and duly secured, according to the terms of the trust, would embarrass, if not totally nullify the whole power to sell.¹

§ 396. And there is much reason in the doctrine, that where the trust is defined in its object, and the purchase-money is to be re-invested upon trusts which require time and discretion; or the acts of sale and re-investment are manifestly contemplated to be at a distance from each other, the purchaser shall not be bound to look to the application of the purchase-money; for the trustee is clothed with discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should rather be those who have reposed confidence in him, than those who have bought under an apparently authorized act.² The doctrine, however, is to be taken with this qualification, that the purchaser be not both buyer and seller; for where the trustee himself becomes the purchaser, there is no reason why the *cestui que trust* should be remitted to a personal right against the fraudulent trustee.³

¹ Dalzell v. Crawford, 1 Pars. 49-50; Doran v. Wiltshire, 3 Swanst. 699; Wood v. Harman, 5 Madd. 368; Garnett v. Macon, 2 Brock. 231; Lining v. Peyton, 2 Dessaus. 375.

² Wormley v. Wormley, 8 Wheat. 422.

³ Bruck v. Lantz, 2 Rawle, 417; Cadbury v. Duval, 10 Barr, 272.

CHAPTER XXI.

CHARITIES.

§ 397. THE subject of charities, arising as it most commonly does, in cases of wills, and constituting a large and important branch of the equitable jurisdiction relating to trusts, still remains to be considered. Charities have always been favoured in the law, by excepting them, when fastened on lands, from ordinary rules. Courts of common law and equity, were astute in devising means of giving application and effect to the intent of the donor in favour of a charity; whenever the instrument would pass the legal estate, either to the trustee or *cestui que trust*, or *use*, they supported the charity; the mode of establishment, or the distribution, was a circumstance in which they would relieve, according to their respective powers, against any defects in the disposition by will or deed. A donation to a charity could only fail for want of a capable object, where there was neither a devisee to use, in trust, nor a *cestui que use* capable of holding; they took effect whenever a trust was created and vested in any body or person who was named, described, or could be brought within the scope of the will, and was capable of holding, either as *cestui que trust*, or as trustee.¹

§ 398. The English statute of 43 Eliz., commonly

¹ Magill v. Brown, Bright. R. 386-7. See *Fontain v. Ravenel*, 3 Am. L. R. 269.

called the statute of charitable uses, never was in force, as a statute, in Pennsylvania, simply because its peculiar machinery was wholly inapplicable to our colonial institutions. But its conservative provisions have been in force here by common usage and constitutional recognition; and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it.¹ The jurisdiction of chancery over trusts was never questioned by the most strenuous advocates of the common law: so, cases of covin and fraud were cognizable in equity from the earliest times. It has never been pretended that the course of equity on these subjects was regulated or in any way affected by the 43 Eliz.; it was founded on principles which were the origin and foundation of its jurisdiction, and became gradually developed, according to the exigency of the times. There is no reason which would prevent their application to charities in all cases between subjects, before the 43 Eliz., in the same manner as after. So far as any traces of its jurisdiction are to be found in the books, it seems to have been under the three heads of fraud, trust, and accident, and exercised without any doubt of the power, in all cases where either circumstance existed.²

§ 399. It would seem, that every kind of legal public benefaction is included in the notion of a charity. One of its qualities is generality, but this is satisfied by a comprehension of particular classes of persons or designated communities. From its nature, permanency either of the donation, or its object, would seem to be also re-

¹ *Zimmerman v. Anders*, 6 W. & S. 220; *Pepper's Will*, 1 Pars. 450; *Witman v. Lex*, 17 S. & R. 91; *Vidal v. Girard's Executors*, 2 How. 155, 196; *Fontain v. Ravenel*, 3 Am. L. R. 273.

² *Magill v. Brown*, Bright. R. 390-1.

quisite. Yet certainly, perpetuity is not and therefore a charity may exist consistently with an express or implied limitation.¹ Not only are charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars.² So also, funds given for supplying a town with water;³ for the improvement of a city;⁴ for establishing a life-boat for the use of a town;⁵ for a fire-engine or hose company;⁶ and for any legal, general, or public purpose, have been held to be charitable funds to be administered by courts of equity.⁷

§ 400. A devise to a charity will be supported in equity, notwithstanding an apparent uncertainty both as to the trustees and the objects of the charity, if a discretionary power of selection be vested any where. Thus, a devise of real and personal estate to the monthly meeting of Friends of Philadelphia, for the northern district, (an unincorporated religious association) to be applied as a fund for the distribution of good books, among poor people in the back part of Pennsylvania, or to the support of an institution or free-school in or near Philadelphia, was established as a charity against the heirs and representatives of the testator;⁸ and so was a bequest of

¹ *Wright v. Linn*, 9 Barr, 438.

² *Vidal v. Girard's Executors*, 2 How. 191-2.

³ *Jones v. Williams*, Amb. 651.

⁴ *Howse v. Chapman*, 4 Ves. 542.

⁵ *Johnson v. Swan*, 3 Madd. 464.

⁶ *Thomas v. Ellmaker*, 1 Pars. 98; *Magill v. Brown*, Bright. R. 405.

⁷ *Thomas v. Ellmaker*, 1 Pars. 108.

⁸ *Pickering v. Shotwell*, 10 Barr, 23. In the books, it is said, the thing given becomes a charity, where the uncertainty of the recipient begins. This is beautifully illustrated in the Jewish laws, which required the sheaf to be left

money to a church, to be laid out in bread annually, for ten years, for the poor of the congregation.¹ Nothing is more frequent in Pennsylvania than bequests to unincorporated congregations, without the intervention of trustees; and such bequests have uniformly been upheld by the courts as charities.²

§ 401. This matter is now regulated by statute, whereby it is provided "that no disposition of property hereafter made for any religious, charitable, literary, or scientific use, shall fail for want of a trustee, or by reason of the objects being indefinite, uncertain, or ceasing or depending upon the discretion of a last trustee, or being given in perpetuity, or in excess of the annual value hereinbefore limited;³ but it shall be the duty of any orphans' court, or court having equity jurisdiction in the proper county, to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained, and carried into effect, consistently with law or equity; for which purpose, the proceeding shall be instituted, by leave of the attorney-general of the commonwealth, on the relation of any institution, association, or individual, desirous of carrying such disposition into effect, and willing to become responsible for the costs thereof; subject to an appeal, as

in the field for the needy and passing stranger. *Fontain v. Ravenel*, 3 Am. L. R. 269.

¹ *Witman v. Lex*, 17 S. & R. 88.

² *Methodist Church v. Remington*, 1 Watts, 224.

³ This act provides that no unincorporated charity shall acquire and hold, either in the associate name, or that of trustees, or otherwise, real or personal property that, in the aggregate, is of a greater yearly value than, if incorporated it would be allowed to hold, under the general laws for incorporation of such associations. The same act limits the amount of real and personal estate, which such societies and corporations may acquire and hold, at the sum of five thousand dollars per annum. Act 26 April 1855. *Purd. Dig.* 1119.

in other cases in said courts respectively, and to be reviewed, reversed, affirmed, or modified, by the supreme court of this state; but if the objects of the trust be not ascertainable, or have ceased to exist, or such disposition be in excess of the annual value permitted by law, or in perpetuity, such disposition, so far as exceeding the power of the courts to determine the same, by the rules of law or equity, shall be taken to have been made, subject to be further regulated and disposed of by the legislature of this commonwealth, in manner as nearly in conformity with the intent of the donor or testator, and the rules of law against perpetuities, as practicable; or otherwise, to accrue to the public treasury, for the public use.”¹

§ 402. Charities are so highly favoured in the law, that they have always received a more liberal construction than the law will allow in gifts to individuals.² Thus, a bequest to an executor not nominated, or to an executor nominated but dead before the testator, though void at law, will be executed in equity where the object is a charitable one.³ And it is immaterial whether the person to take be *in esse*, or not; or whether the legatee were at the time of the bequest a corporation capable of taking, or not; or how uncertain the objects may be, provided there be a discretionary power vested any where, over the application of the testator’s bounty to those objects; or whether their corporate designation has been mistaken; if the intention sufficiently appear on the bequest, it will be held valid.⁴

§ 403. So also, a defective execution of a power will be aided in favour of a charity. Thus, where a power

¹ Act 26 April 1855, § 10. Purd. Dig. 1118-19.

² 2 Story’s Eq. § 1165.

³ *Pickering v. Shotwell*, 10 Barr, 27.

⁴ *Witman v. Lex*, 17 S. & R. 93; *Vidal v. Girard’s Executors*, 2 How. 197.

of appointment was given by deed, to be executed by writing under hand and seal, in the nature of a last will and testament, and duly attested by two or more witnesses; a writing in the nature of a last will, executed in the presence of two witnesses, but not under seal, was held not to be a valid execution of the power; yet, in favour of a charity, any writing, however informal as an execution of a power, is good as an appointment. The aid thus given by equity to a power defectively executed in favour of a charity, is one of the conservative doctrines flowing from, or expanded by the statute of charitable uses, which forms part of our system of the law of charities.¹

§ 404. But although the principles of the statute of charitable uses have been adopted by the courts of Pennsylvania, they will not exercise the discretion assumed by an English chancellor, of directing the disposition of the funds, on the doctrine of *cy pres*. No court here possesses the specific powers necessary to give effect to the principle of *cy pres*, even were the principle itself not too grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment.² No one would desire to see the doctrine of *cy pres* carried to the extravagant length that it was formerly in England, or witness the exercise of an arbitrary discretion, in giving effect to a general intention to leave a sum of money to charitable purposes, to be designated thereafter, by disposing of it to such charities as the court chooses to direct. No such discretion is vested in our courts.³ If the trusts limited in a devise be such

¹ Pepper's Will, 1 Pars. 436, 451; Magill v. Brown, Bright. R. 408.

² Methodist Church v. Remington, 1 Watts, 226.

³ Witman v. Lex, 17 S. & R. 93; Flaherty's Estate, 2 Pars. 190; Fontain v. Ravenel, 3 Am. L. R. 276. Although the doctrine of *cy pres* has not been

as a chancellor would not execute, it has been held, that equity will treat the devisees as trustees for the heirs at law or next of kin of the testator.¹ But since the passage of the act of 1855, it would seem that the property would vest in the state, for the public use.²

§ 405. A gift to a charity is not necessarily affected by the rule against perpetuities, as it is in the very nature of such a gift to withdraw the thing given from commerce and circulation, since alienation of it would be inconsistent with the use to which it had been dedicated. But a trust for perpetual accumulation of a part of the income, though a consequence not intended, and though the founding of a charity were the exclusive motive, would be a perpetuity productive of all the evils which the law abhors; and such trust being absolutely void, the heirs at law of the testator would be entitled to recover the lands devised.³ But a devise of lands in fee

adopted by our courts, it appears that the power may be exercised by the legislature, under the act of 1855, above cited. *Ante*, § 401.

¹ *Miller v. Lerch*, 1 Wall. Jr. 216; *Hillyard v. Miller*, 10 Barr, 326; *Metho-dist Church v. Remington*, 1 Watts, 226.

² See *Ante*, § 401.

³ *Hillyard v. Miller*, 10 Barr, 335. The act of 1855 provides, that "to avert the evil of an indefinite increase of the property in mortmain and perpetuity, it shall not be lawful for any religious, charitable, literary, or scientific society, association, or corporation, present or future, to accumulate income into capital or invested estate, so that the clear annual value thereof, as regards future acquisitions, with those now held, shall exceed the limitation hereinbefore contained (\$5000 per annum,) and as regards acquisitions now held by or for any such body, shall not exceed said annual amount, except as the property now held does, or being made more productive, may exceed such amount, but all such clear income, after such amount of capital, or invested estate, shall be attained, shall be expended annually in and for the purposes, uses, and trusts upon and for which the property producing it is held; and if there be not objects within the intent of such purposes, uses, and trusts sufficient to exhaust such income, it shall be the duty of such body or association holding such property, to apply to the legislature for authority to expend the income thereof upon such practicable objects as shall most nearly conform to the intent of the

for the objects of a charity, does not necessarily exclude the power of alienation for general purposes; the donees hold the lands for a qualified purpose, because the law does not allow them to hold for general purposes; but this qualification has place only as between the public and the holders, and not between the grantors and the holders. It is not a qualification of the estate as granted, but of the uses to which, in such hands, it may lawfully be applied. It is not intended to prevent alienation for general purposes, but to prevent the donees from using the land for general purposes; it defines a duty of the donees to the state, not to their grantors. Such grants are, as between the grantor and grantees, fees simple, and as between the trustees and beneficiaries, they are trusts. To reduce them to qualified fees, words must be added showing clearly that the testator intended that the land should revert on the abandonment of the particular use.¹

§ 406. The statutes of mortmain have been extended to this state, only so far as they prohibit dedications of property to superstitious uses, and grants to corporations and to unincorporated religious, and other societies, without a statutory license.² As to the statutes of superstitious uses, it suffices to say, that where there can be no religious establishment, no restraint on the free exercise of religion, and no preference of modes of worship, the celebration of divine service according to the rites of any

uses and trusts upon which such property is held; and in default thereof, such income as shall not be so expended in execution of its trust, shall be paid into the treasury of the commonwealth; provided, that this section shall not be taken as intended to apply to any corporation or trust, if any there be, placed by contract beyond such legislative requisition." *Purd. Dig.* 1119.

¹ *Griffitts v. Cope*, 5 Harris, 95, 100; *Barr v. Weld*, 3 Pittsburgh Leg. J. 27.

² *Methodist Church v. Remington*, 1 Watts, 224.

church or society worshipping the Supreme Being, cannot be deemed unlawful or superstitious.¹

§ 407. The act of 1855, however, has very materially narrowed the extent and operation of the statute of charitable uses; this act provides "that no estate, real or personal, shall hereafter be bequeathed, devised, or conveyed, to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto, shall be void, and go to the residuary legatee, or devisee, next of kin, or heirs, according to law; provided that any disposition of property, within said period, *bonâ fide* made, for a fair valuable consideration, shall not be hereby avoided."²

¹ Magill v. Brown, Bright. R. 373; Methodist Church v. Remington, *ut supra*.

² Act 26 April 1855. Purd. Dig. 1119.

CHAPTER XXII.

IMPLIED TRUSTS.

§ 408. IN connexion with the equitable doctrine in relation to trusts, there still remains to be considered the class comprised under the head of implied, constructive, and resulting trusts. An implied trust is one which, without being expressed, arises upon the presumed intention of the parties; or which, independent of any such intention, arises, *ex maleficio*, by operation of law, as in case of fraud, imposition, notice of an adverse equity, and others of a like nature.¹ It is to be observed, however, that the law never presumes a trust, but in case of absolute necessity; for if a chancellor may construe a trust by implication, or presume a trust unnecessarily, a way is opened by which any man may be construed or presumed out of his estate.² A trust, therefore, is never presumed or implied, as the intention of the parties, unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions.³

§ 409. If a trust be created for the benefit of a third person, without his knowledge, he may, when he has notice of it, affirm the trust, and call upon the court to enforce the performance of it.⁴ This is one of the most

¹ 2 Story's Eq. § 1195; 4 Bouv. Inst. 242.

² *Cook v. Fountain*, 3 Swanst. 585.

³ 2 Story's Eq. § 1195.

⁴ 4 Kent's Com. 307.

simple forms in which an implied trust can be presented. Thus, if one procure a conveyance of land to be made to him, upon the promise and assurance that he will hold it in trust for another, that trust may be established by the parol testimony of the grantor; and if the land be sold by the grantee, the *cestui que trust* may maintain an action against him to recover the price.²

§ 410. So, when an estate is conveyed in trust to serve certain uses, a resulting trust arises by implication of law to the grantor, for all such parts of the equitable estate as are not disposed of by the deed:² where a trust has been declared of but part of the estate, the law implies an intent to reserve the beneficial ownership of the residue.³ And if the trusts limited on a devise, be such as a chancellor would not execute, a court of equity will treat the devisees, as trustees for the heirs at law or next of kin of the testator, and will decree a conveyance of the legal estate to them.⁴ In all cases of this kind, the rule of law is, that the beneficial interest undisposed of, results back to the original owner, or to his representatives, real or personal, according to the nature of the property.

§ 411. Another instance of a resulting trust is, where a conveyance is made without any consideration, or without any distinct use being declared. In such case, the intent is presumed to be, that it shall be held by the grantee for the benefit of the grantor, as a resulting trust.⁵ As for instance, where land is conveyed for a consideration which is to be afterwards ascertained by

¹ *Miller v. Pearce*, 6 W. & S. 97. And see *Kirkpatrick v. McDonald*, 1 Jones, 387.

² *Huston v. Hamilton*, 2 Binn. 387.

³ *Kisler v. Kisler*, 2 Watts, 324.

⁴ *Miller v. Lerch*, 1 Wall. Jr. 216.

⁵ 2 Story's Eq. § 1197.

the price at which the grantee may sell it, there arises a resulting trust to the grantor until the sale be made; and the grantee becomes a trustee, subject to all the equitable rules which would have bound him, had the deed in express terms empowered him to sell for the use of the grantor.¹

§ 412. A resulting trust likewise arises, where an estate has been purchased in the name of one person, and the purchase money or consideration has proceeded from another.² In this case, the presumption of law is, that the party paying for the estate intended it for his own benefit, and that the nominal purchaser is a mere trustee. It is the law of England and of Pennsylvania, that where one buys land and pays for it with his own money, but permits the conveyance to be made in the name of another, a resulting trust arises in favour of him who paid the purchase money; and the nominal grantee holds the land as trustee for the real purchaser. This principle is applicable, as well to purchases from the commonwealth as to conveyances from one private individual to another. The person whose name is used as a warrantee, is a trustee for him who took out the warrant and paid the fees and purchase money.³

§ 413. This presumption exists, in all cases where the legal title is made to one who has not really advanced the price; and it is equally applicable whether such conveyance be in the name of a stranger only, without mention of the actual purchaser, or in the joint names of a stranger and the purchaser himself; whether the estate

¹ *Prevost v. Gratz*, 1 P. C. C. 367.

² *Wallace v. Duffield*, 2 S. & R. 529; *German v. Gabbald*, 3 Binn. 305; *Kisler v. Kisler*, 2 Watts, 324; *Robertson v. Robertson*, 9 Watts, 35.

³ *Strimpfler v. Roberts*, 6 Harris, 295; *Cox v. Grant*, 1 Yeates, 164; *Fogler v. Evig*, 2 Yeates, 119.

be originally conveyed to one purchaser out of many, or become ultimately vested in one as the survivor, under an assurance which has created a legal joint tenancy; or whether, in the case of several nominal purchasers, an immediate joint estate be given to all, or the grant be to take successively one after another. Whatever be the peculiar form in which the assurance is made, it does not affect the presumption, that an estate or share of an estate, vested in a man who did not pay its price, was not intended by way of beneficial ownership; and therefore, in all those cases alike, if there be no evidence of an opposite intention, the trust of such legal estate will result to the parties who have advanced the purchase money, in proportion to the amount of their respective advances. And as trusts of this kind are expressly exempted from the statute of frauds, it is competent for the real purchaser to prove his payment of the purchase money by parol evidence, even though it be otherwise expressed in the deed.¹

§ 414. It is well settled, that nothing more is necessary to establish such a resulting trust, than to prove that the lands were paid for with the money of the *cestui que trust*. This naked fact is enough to make out a *primâ facie* case, liable however to be overthrown, by proving that the payment was a gift of the money to the grantor of the legal title. One who takes a deed in his own name for land paid for by another, is a trustee by force and operation of law, not because he *agrees* to hold for the other party, but because he cannot hold for his own use, without violating conscience, good faith, and honesty.

¹ Adams' Eq. 33-4; *Strimpfler v. Roberts*, 6 Harris, 295; *Jackman v. Ringland*, 4 W. & S. 150; *Lloyd v. Carter*, 5 Harris, 221; *Blyholder v. Gilson*, 6 Harris, 137; *Slaymaker v. St. John*, 5 Watts, 30; *Stewart v. Brown*, 2 S. & R. 461-2.

The trust results from, and the obligation to execute it is implied by, not his will, but the nature of the transaction.¹

§ 415. This doctrine, however, is subject to several exceptions; thus, in the first place, equity will not, by implication, raise a use for a person who, by law, is incapable of holding, as an alien: in such case, a resulting trust will not be enforced in favour of the alien purchaser, in fraud of the rights of the commonwealth or the law of the land.² And since the resulting trust is merely that of an equity, founded upon the presumptive intention of the parties, that equity may be rebutted, even by parol evidence, and circumstances to defeat it. If, for instance, the person, for whose benefit the trust would otherwise be created, declare that the purchase was not made for him, or if both parties treat it as a purchase for the use of him to whom the conveyance is made, no resulting trust will arise.³

§ 416. Another exception is, where a purchase has been made in the name of a child, or of one towards whom the party paying the money has placed himself *in loco parentis*. For when a parent purchases in the name of the son, the purchase will be deemed, *primâ facie*, an advancement, so as to rebut the presumption of a resulting trust for the parent. The moral obligation of a parent to provide for his children is the foundation for the exception; or rather of the rebutter of the presumption; since it is not only natural but reasonable to presume, that a parent, by purchasing in the name of a child, intends it as a benefit to the latter, in discharge

¹ *Lynch v. Cox*, 11 Leg. Int. 166.

² *Philips v. Crammond*, 2 W. C. C. 447; *Leggett v. Dubois*, 5 Paige, 114.

³ *Philips v. Crammond*, 2 W. C. C. 445; *Adams' Eq.* 33 n.

of the moral obligation, and also as a token of parental affection.¹

§ 417. And here it may be observed, that the party who undertakes to establish a resulting trust by parol evidence, takes the burden of proof upon himself. He claims an estate in land, not only without a deed, but in opposition to the written title. The whole doctrine of resulting trusts is a violation of the sound principles on which the statute of frauds is based, and ought not to be favoured, except when the trust originated in the bad faith of the nominal purchaser. The extension of it to cases in which the *cestui que trust* has voluntarily placed his rights in such a condition, that he can only establish them by parol, is of doubtful policy; and, like other departures from the statute of frauds, has probably done more mischief than it has ever corrected.²

§ 418. The doctrine, that parol evidence may be received to establish a trust, is confined to those cases of resulting trusts which arise by implication of law. In such cases, the legal title is in one, the equitable title in another, and to prevent fraud, the fact of payment of the purchase money may be established by parol evidence; and equity will decree the nominal purchaser a trustee for the use of him who paid the purchase-money.³ Such an implied trust is not within the statute of uses, and can only be executed by the voluntary conveyance of the trustee, or by a decree in chancery; and after a lapse of time sufficient to bar the claim at law, by force of the statute of limitations, equity will grant no relief. Evidence of purchase money paid by the plaintiff, will in such cases be disregarded, if the date of the payment be more

¹ Phillips v. Gregg, 10 Watts, 171.

² Strimpfler v. Roberts, 6 Harris, 298.

³ Jackman v. Ringland, 4 W. & S. 150.

than twenty-one years before suit brought, unless accompanied by proof of such acknowledgments as will take the case out of the rule.¹

§ 419. Another instance in which a resulting trust arises by implication of law is, where one of two joint tenants, under a defective title, purchases the adverse title: in such case he will be held a trustee for his co-tenant, subject to the payment of a due proportion of the purchase money. The purchase of one accrues for the benefit of both.² So one of two devisees cannot purchase an incumbrance on their joint estate, and use it to sell the land, and deprive the other of his property: in that case, he is but a trustee.³ It is not consistent with good faith, nor the duty which the state of the parties as claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole to himself, and thus undermine his co-tenant. It would be an unusual act, repugnant to a sense of refined and accurate justice. It cannot be tolerated in a common subject, in which the parties had an equal concern, and which created an obligation to deal candidly and honestly with each other.⁴

§ 420. A resulting trust, properly so called, arises where the purchaser of land pays the purchase money, but takes the conveyance in another person's name; but where a trustee purchases with the trust fund, and takes the conveyance in his own name, there is, properly

¹ *Strimpfler v. Roberts*, 6 Harris, 301-2.

² *Smiley v. Dixon*, 1 Penn. R. 441. A resulting trust would arise to a partnership, in lands purchased by one of the partners, and paid for out of the joint funds. *Philips v. Crammond*, 2 W. C. C. 445.

³ *Myers' Appeal*, 2 Barr, 466.

⁴ *M'Pherson v. Cunliff*, 11 S. & R. 427 n; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Eakin v. Raub*, 12 S. & R. 377.

speaking, no resulting trust, though it is usually called so; for there is, in equity, a very substantial difference between them, both in the quality and extent of the relief that can be called for. In the former, the trustee will be compelled to execute the trust, by a conveyance of the land; in the latter, chancery will raise the money out of the land, by a sale of the whole, or such part of it as may be necessary to produce the sum withdrawn from the trust; and this mode is peculiarly convenient, where only a part of the consideration has been taken from the trust fund.¹ The person who is entitled to the money, which has been thus invested, may however, at his election, consider the purchase as made for his use, and the purchaser a trustee for him.²

§ 421. In all cases of fraud, and where transactions in relation to the purchase of land, have been carried on *malâ fide*, there is a resulting trust by operation of law;³ thus, where one purchases at sheriff's sale, in trust for another, and thereby prevents others from bidding, a trust arises *ex maleficio*, and the case is excepted out of the statute of frauds and perjuries.⁴ But unless there be something in the transaction more than is implied from the violation of a parol agreement, equity will not decree the purchaser to be a trustee. And this distinction is indispensable, otherwise there would be a repeal of the statute, under the pretence of preventing fraud by decreeing an express trust, which would be introductive of the very evils the statute was designed to prevent.⁵ A purchaser

¹ Wallace v. Duffield, 2 S. & R. 529; Evans' Estate, 2 Ash. 482; German v. Gabbald, 3 Binn. 305; Kisler v. Kisler, 2 Watts, 324.

² Philips v. Crammond, 2 W. C. C. 445; Oliver v. Piatt, 3 How. 333.

³ Robertson v. Robertson, 9 Watts, 36; Haines v. O'Connor, 10 Watts, 320.

⁴ Brown v. Dysinger, 1 Rawle, 408; Graham v. Donaldson, 5 Watts, 452.

⁵ Robertson v. Robertson, 9 Watts, 36.

at sheriff's sale, who has paid the money, can only be held a trustee *ex maleficio*, on the ground of fraud; and where he is guilty of fraud, he is a trustee for the creditors, and for the debtor also, unless the debtor be *particeps criminis*. But without the ingredient of fraud, as in case of private sales, he may avail himself of the protection of the statute.¹ Equity will not, however, permit one to hold a benefit, which he has derived through the fraud of another, and much less will it do so, if he have acquired it by means of his own fraud. This principle seems not only to be just and to commend itself strongly to the moral sense, from the bare statement of it, but it has been acted upon, and made the foundation of a series of decisions.²

§ 422. We have already seen,³ that whatever acts are done by trustees, in regard to the trust property, shall be deemed to be done for the benefit of the *cestui que trust*, and not for the benefit of the trustee; and that if a trustee, executor, or other person, occupying a fiduciary character, buy in a debt due by his *cestui que trust*, testator, or principal, for less than its nominal amount, the benefit derived thereby belongs not to him, but to the person for whom he acted.⁴ And the same principle applies to all persons standing in fiduciary relations to each other; thus, courts of equity exact the most scrupulous good faith from agents of every description, during the continuance of their agency: to prevent fraud, they cannot purchase the estate of their principals, but in trust. When

¹ Haines v. O'Connor, 10 Watts, 320; M'Culloch v. Cowher, 5 W. & S. 430; Fox v. Heffner, 1 W. & S. 376.

² Miller v. Pearce, 6 W. & S. 100; Sheriff v. Neal, 6 Watts, 540-1; and cases there cited.

³ Ante, § 99.

⁴ Prevost v. Gratz, 1 P. C. C. 373; Saeger v. Wilson, 4 W. & S. 504-5.

confidence is reposed, the law forbids it shall be abused: to prevent abuse it turns the purchaser into a trustee.¹

§ 423. Cases of equitable conversion of property, are also properly referable to the doctrine of implied trusts. By equitable conversion is intended an implied change of property from personal to real, or from real to personal, so that each is deemed to be transferable and descendible according to its new character.² This change is a consequence of the doctrine, that equity looks upon things agreed to be done as actually performed.³ Thus, when an agreement is made for the sale of an estate, the vendor is considered as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor.⁴ Under such circumstances, the vendor is treated as the owner of the land, and he may dispose of it by contract, will, or deed.⁵ So, if one covenant to lay out a sum of money in the purchase of land, generally, and devise his real estate before he has made the purchase, the money agreed to be laid out will pass to the devisee as representing land.⁶ So also, where the property devised is real, and directed to be divided for the general purposes of the will, as for instance, to form with the personalty a common fund, for all the purposes of the will; although it should happen that some of them fail, it will be considered an absolute conversion. The new character is definitively and imperatively fixed upon the property, or in more technical words, it is said to be converted out and out.⁷

¹ Myers's Appeal, 2 Barr, 466; Rankin v. Porter, 7 Watts, 390; Moore v. Moore, 1 Seld. 256. ² 2 Story's Eq. § 1212. ³ Ante, § 245.

⁴ Rangler's Appeal, 3 Barr, 378; Lee v. Tiernan, Add. 349; Stewart v. Freeman, 10 Harris, 123.

⁵ Fisher v. Harris, 10 Barr, 459; Allison v. Wilson, 13 S. & R. 332; Wells v. Sloyer, 3 Penn. L. J. 206; Kerr v. Day, 2 Harris, 114.

⁶ Kerr v. Day, 2 Harris, 114.

⁷ Burr v. Sim, 1 Wh. 263.

§ 424. We will now proceed to the consideration of that species of implied trusts arising from what are termed equitable liens. A lien is neither a *jus in re*, nor a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing; it is simply a charge upon it.¹ Liens are divided into legal and equitable. The former are those which may be enforced in a court of law; the latter are valid only in a court of equity. Equitable liens arise from constructive trusts, and are wholly independent of the possession of the thing to which they are attached as a charge or incumbrance.²

§ 425. The lien which the vendor of real estate has on the land sold for the unpaid purchase money, is a familiar example of an equitable lien. It is a well settled doctrine of courts of equity, that the vendor of land has a lien for the amount of purchase money, not only against the vendor himself and his heirs, and others, privies in estate, but also against all subsequent purchasers having notice that the purchase money remains unpaid. This doctrine, it is said, was taken from the civil law; and the principle upon which the courts of equity have proceeded in establishing this lien in the nature of a trust is, that a person having gotten the estate of another ought not, in conscience, as between them, to be allowed to keep it, and not to pay the consideration money. A third person, having a full knowledge that the estate has been so obtained, ought not to be permitted to keep it, without making such payment; for it attaches to him also, as a matter of conscience and duty. This is now the uncontested doctrine of courts of equity.³

¹ 2 Story's Eq. § 1215; 4 Bouv. Inst. 244.

² 4 Bouv. Inst. 245.

³ Bear v. Whisler, 7 Watts, 147.

§ 426. But this is not the doctrine of the courts of Pennsylvania, except in cases in which the vendor retains the legal title, or where the deed contains an express stipulation, that the balance of the purchase money shall be a lien on the land until the whole amount be paid.¹ Where an absolute conveyance is made of land, a receipt given for the purchase money, and the possession given to the vendee, part of the purchase money being unpaid, and the bond of the vendee, or a surety, taken for the residue thereof; the vendor has not a lien for such residue of the purchase money against judgment creditors of the vendor, whose judgments are subsequent to the conveyance, although they had notice of the balance of the purchase money due.² The implication that there is an intention to reserve a lien for the purchase money, in all cases where the parties do not, by express acts, evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of every thing that can pass.³

§ 427. Another species of equitable lien, is that which results to a joint owner of real estate, or other joint property, from repairs and improvements made thereon for the joint benefit, and for disbursements touching the same.⁴ This doctrine of equitable lien has not, however, been engrafted on the jurisprudence of this state;⁵ with us, liens on land which are to bind it in the hands of

¹ *Stouffer v. Coleman*, 1 Yeates, 393; *Stewart v. Coder*, 1 Jones, 94; *Barnitz v. Smith*, 1 W. & S. 145.

² *Bear v. Whisler*, 7 Watts, 147; *Patterson v. Forry*, 2 Barr, 459; *Mode's Appeal*, 6 W. & S. 285; *Zentmeyer v. Mittower*, 5 Barr, 412; *Hepburn v. Snyder*, 3 Barr, 78.

³ *Kauffelt v. Bower*, 7 S. & R. 76-7.

⁴ 2 Story's Eq. § 1234.

⁵ *Hepburn v. Snyder*, 3 Barr, 78; *Sands v. Smith*, 3 W. & S. 13.

purchasers, are *strictissimi juris*. They are cautiously prescribed by law, and the modes of entering and continuing them must be strictly complied with. It is well settled, that two parties cannot by their private agreement create a parol mortgage, which shall have the legal effect of a mortgage by reason of verbal notice to creditors or purchasers. This would overthrow the recording acts, and the acts relative to judgments and other liens. It would be inconsistent with the whole tenor of our decisions, contrary to the settled policy of the legislature, and productive of infinite peril to landholders and creditors, and of strife and uncertainty to the community.¹ This doctrine may appear inconsistent with the acknowledged right of a vendor who has not parted with the legal title; but it may be observed, that an equitable lien can only properly arise where the legal title has been conveyed. One who has the legal title stands in need of nothing more to enable him to recover the purchase money at law, as the land is pledged for the payment by the retention of the title.²

§ 428. Another class of implied liens or trusts arises, where property is devised by will subject to a charge for the payment of debts or legacies.³ Charges of this nature are often expressly created, but they may undoubtedly arise by implication.⁴ No form of words is necessary to produce such effect, and where the intent is manifest, courts are bound to carry it into execution.⁵ It must however appear, by direct expression or plain implication, that such was the intention of the testator, or the claim of the legatee will not follow the lands into

¹ Mode's Appeal, 6 W. & S. 284.

² Bear v. Whisler, 7 Watts, 148.

³ 2 Story's Eq. § 1244.

⁴ Nichols v. Postlethwaite, 2 Dall. 131; Hassanclever v. Tucker, 2 Binn. 526; Witman v. Norton, 6 Binn. 395; Dobbins v. Stevens, 17 S. & R. 13.

⁵ Ripple v. Ripple, 1 Rawle, 390.

the hands of an innocent purchaser.¹ Thus, an intent to charge has been implied from a devise of the residue, real and personal, after payment of legacies; whence a supposed design, that the devisee should have nothing till the legacies were first taken out of the land.² And so also, where the real estate is blended by the testator with the personal, the land is charged with the payment of legacies; and the reason is, that the whole will may take effect, and all the legacies be paid, which is justly supposed to be the intention of the testator, when both funds are put into one.³

§ 429. But to make a legacy a charge upon land, it is necessary that it should be declared to be so by express words, or that it may be inferred from the whole will that such was the intention of the testator.⁴ It is not the policy of the law to encourage charges on lands, as it trammels the transfer of that species of property, and creates embarrassment to vendor, vendee, and creditors; and hence it is, that the law is so stringent in respect to incumbrances. Indeed, the rule adopted by the courts, in most cases, carries into effect the intention of the testator; for when he designs to charge his real estate, he usually says so in express terms, or the implication is so strong from the whole will that it is difficult to mistake his intention. He usually places so much confidence in his devisees, not only as to integrity, but ability to pay, that he supposes it unnecessary to do more than to cast on them a personal liability to pay the legatees.⁵ And hence it is clear, that a devise of land, simply, accompanied by a direction to the devisee to pay certain sums

¹ Brandt's Appeal, 8 Watts, 202. ² Tower's Appropriation, 9 W. & S. 105.

³ M'Lanahan v. M'Lanahan, 1 Penn. R. 112.

⁴ Montgomery v. M'Elroy, 3 W. & S. 371.

⁵ Wright's Appeal, 2 Jones, 257.

to others, does not constitute those sums an incumbrance upon the devised lands, but they become a personal charge on the devisee, in respect to the land devised to him, which, by acceptance, he undertakes to discharge.¹

§ 430. Another instance of an implied trust is, where a party takes an estate, which is already subject to an incumbrance, and by his own express covenant makes himself personally liable for the debt. In such case the real estate is treated as the primary fund for the payment of the incumbrance. Thus, where a person takes a conveyance of land subject to a mortgage, covenanting to indemnify the grantor against the mortgage, and having paid off part of the incumbrance, dies intestate, the land is the primary fund to be resorted to for the payment of the residue, and the heir cannot throw the charge upon the personal representatives.²

§ 431. Implied trusts and constructive trusts are frequently confounded or classed together; and the same trusts are sometimes designated by the name of implied trusts, and at other times by that of constructive trusts. But a constructive trust, as distinguished both from express and from implied trusts, may be defined to be a trust which is raised by construction of equity, in order to satisfy the demands of justice, without reference to any presumable intention of the parties.³ Several instances of this species of constructive trusts have been already considered.

§ 432. Thus we have seen, that a trust will be enforced not only against those who are rightfully possessed of the fund as trustees, but also against all others who

¹ *Miltenberger v. Schlegel*, 7 Barr, 243; *Brandt's Appeal*, 8 Watts, 198; *Dewitt v. Eldred*, 4 W. & S. 422; *Lobach's Case*, 6 Watts, 169.

² *Mason's Estate*, 1 Pars. 133; *Cumberland v. Codrington*, 3 Johns. Ch. 229. See 1 Lead. Cas. Eq. 448.

³ *Smith's Eq.* 117.

have obtained it, without consideration, or with notice of the trust; for courts of equity consider the purchaser, with notice, from a fraudulent trustee, as a trustee for the beneficial owner.¹ The mere possession, however, of a *cestui que trust*, and the exercise by him of acts of ownership, are not constructive notice to a purchaser of the legal title from the trustee; there should be direct, express, and positive notice of the fact.² The undisturbed possession of land, has generally been considered as legal notice, because the fact of possession being notorious, it is sufficient to put the purchaser on his guard, and to induce him to inquire into the title of the possession. But to entitle the bare possession to such weight, it ought to be a clear unequivocal possession; and the doctrine is subject to many exceptions.³

§ 433. So also it is well settled, that if a trustee, in violation of his duty, invest the trust money in lands, the *cestui que trust* may, at his option, accept the lands, or he may refuse them, and demand his money.⁴ So long as it can be identified either as the original property of the *cestui que trust*, or as the product of it, equity will follow it, unless the right of reclamation be detached by the superior equity of a *bonâ fide* purchaser, for a valuable consideration, without notice. This right, however, fails, when the subject matter is turned into money, and mixed and confounded in a general mass of property of the same description.⁵

¹ Ante, § 322.

² *Hood v. Fahnestock*, 1 Barr, 477. See *Moyer v. Schich*, 3 Barr, 246-7; *Keeler v. Vantuyte*, 6 Barr, 250.

³ *Billington v. Welsh*, 5 Binn. 132; *Plumer v. Robertson*, 6 S. & R. 184; *Boggs v. Varner*, 6 W. & S. 474.

⁴ *Bonsall's Appeal*, 1 Rawle, 274; *Kaufinan v. Crawford*, 9 W. & S. 134.

⁵ *Thompson's Appeal*, 10 Harris, 17.

CHAPTER XXIII.

OF TRUSTEES.

§ 434. THE nature of a trustee's duty will, in a great measure, appear from a reference to the limitations in the instrument in which it originates: it consists chiefly in the due perception and application of the profits; the execution of estates, and the protection of the property. The application of the profits must of course be according to the instrument declaring the trust, or to the equities of the parties; the execution of estates, where the trusts are executed, must be according to the lawful direction of the *cestui que trust*; where they are executory, to the appropriate construction of the instrument by which they are prospectively created; and the protection of the property, is the maintaining possession of the legal estate or interest which is vested in him.¹ As it is not always easy to determine what is the precise duty of a trustee, he has an undoubted right to come into a court of equity for its assistance and protection in all cases of doubt or difficulty in the administration of the trust, and the personal representatives of a deceased trustee are entitled to the same privilege; and so where any legal proceedings have been commenced against trustees, they are entitled to come to the court for its protection, and to obtain directions as to the mode of de-

¹ Jeremy's Eq. 139.

fence, if any, to be adopted, and to stay the proceedings against them in the mean time, and if a suit be pending between the parties at the time, the application may be made by a petition in that suit.¹

§ 435. A trustee is bound by an implied obligation, to perform all those acts which are necessary and proper for the due execution of the trust which he has undertaken. The fact that a trustee is unwilling to assume any further or additional duties or responsibilities in the execution of the trust, is a matter which a court of equity will not regard, if the necessity or propriety of the case require that additional duties should be assumed for the benefit of the trust property, or the interest of the *cestui que trust*. It is the duty of the court, where a proper case is presented, to direct that to be done, by which the trust shall be rendered most beneficial; and if the trustees be unable or unwilling to act as required, the trust will not be allowed to suffer, but such means as may be necessary will be adopted, to carry into effect the order of the court.²

§ 436. Thus, trustees may be decreed to sell, mortgage, lease, or convey on ground rent, any part of the real estate held in trust, whenever the court shall be of opinion that it is for the interest and advantage of those interested therein, and it may be done without prejudice to the trust, charity, or purpose for which the same shall be held.³ The courts may also, in decreeing such sales, leases, or conveyances on ground rent, order the premises, if necessary, to be so subdivided as to command the highest price or greatest rents, and for such purposes, where the premises may admit or require of it, may lay

¹ Hill on Trustees, 543.

² Carswell's Estate, 12 Leg. Int. 14-15.

³ Purd. Dig. 699.

out roads or streets, and vacate such as shall not have been paid for, or received into actual use by the public, if found to be inconvenient, or to make an unprofitable division of the property.¹ Trustees may also be decreed to make and take conveyances to square and adjust lines between adjoining owners; to perfect the partition of real estate held in common with others; to purchase other real estate when needful to that already owned by such party, or useful to the business thereupon carried on; or when necessary to protect any security or rent held on property exposed to judicial sale.² And in all such cases, jurisdiction is conferred upon the proper orphans' court, or court of common pleas, to make such decree in the premises as the circumstances of the case may require.³

§ 437. The courts are also empowered, whenever in their opinion it will promote the interest of any estate held in trust composed of both real and personal property, to order, on the petition of the trustee, or beneficial owner for at least a life estate, that the personal property, or a portion thereof, shall be applied for the improvement and greater productiveness of the real estate; and in such case, it is the duty of the trustee to keep an account of such expenditure; and if the personal and real estate go to different persons in remainder or reversion, no change will be thereby effected in their rights, but such expenditure will be a charge on the real estate, in favour of those entitled to the personalty; and may be recovered by decree in such court, and if necessary, by an order or decree of sale, as in case of an orphans' court sale.⁴

§ 438. We have seen, that in Pennsylvania all trustees are entitled to compensation for their services in the

¹ Purd. Dig. 700.

² Ibid. 701.

³ Ibid. 700.

⁴ Act 3 May 1855, § 3; Ibid. 1156.

execution of the trust, whether there be any provision or agreement respecting it or not;¹ but this is strictly *ex gratiâ*, and not of right.² A trustee, therefore, in general, is answerable for negligence only when it is so gross as to be evidence of wilful misconduct; but the rule does not apply where he is to receive a stipulated compensation; in such cases, a trustee is liable to account as a bailee for hire.³ Trustees are bound to act with judgment, discretion, and fidelity, in the management and disposition of the property; with such diligence and care as they would bestow upon their own; but they ought not to be held answerable for acts or omissions which would not be deemed culpable in managing their own concerns, even when acting according to their own judgment.⁴ A trust, it is said, is an office necessary between man and man, and which, if faithfully discharged, is attended with great trouble, and it is an act of great kindness to undertake it. To add hazard or risk to that trouble, and to subject a trustee to losses which he could not foresee, would be a manifest hardship, and would deter every man from accepting so necessary an office.⁵

§ 439. If a trustee exercise so much caution in respect to the trust fund, as a prudent man would in regard to his own money, and a loss happen, equity will excuse him. But all the authorities distinguish between such a case and that where the trustee has actually recovered the fund. He is then bound carefully to secure the money which comes to his hands, and if he fail to

¹ Ante, § 325.

² Ex parte Cassel, 3 Watts, 413; Jones's Appeal, 8 W. & S. 150.

³ Ibid.

⁴ Barr v. M'Ewen, 1 Bald. 162.

⁵ Gochenauer v. Froelich, 8 Watts, 22; Johnson's Appeal, 12 S. & R. 324-5; Pim v. Downing, 11 S. & R. 66; Konigsmacher v. Kimmel, 1 Penn. R. 213; Nyce's Estate, 5 W. & S. 254.

do so, and a loss happen, he is responsible. What shall be such apparent adequate security as will excuse a trustee, has been the subject of some diversity of opinion; but it now seems to be agreed that the personal security of an individual is insufficient.¹ And, after some conflict of opinion, the supreme court has held it to be the settled law of Pennsylvania, that a trustee can only protect himself from risk when he invests the trust funds in real or government securities, or makes the investment in pursuance of an order by the court.²

§ 440. And if a trustee invest the trust fund in his own name, it will render him personally responsible for the amount invested.³ It is of the first importance to the *cestui que trust*, and for the benefit of the trustee himself, that their funds should not be intermixed, but should be kept separate and distinct. For unless this rule be observed it puts the trustee in the power of the *cestui que trust*, who may, at his option, either insist on the transfer of the investment, or charge the trustee with the price and legal interest.⁴ This elementary principle, applicable to every investment by a trustee, is essentially that which forbids him to place trust money in the hands of a banker in his own name, except at the risk of the banker's insolvency, or in any other way to confound it with his own.⁵ An agent who places his principal's money to his own account with his general banker, takes the risk of the banker's failure; for he cannot so

¹ Nyce's Estate, 5 W. & S. 256; Swoyer's Appeal, 5 Barr, 384; Hemphill's Appeal, 6 Harris, 306.

² Hemphill's Appeal, 6 Harris, 305-6; Worrell's Appeal, 11 Leg. Int. 54. And see Purd. Dig. 197; Barton's Estate, 1 Pars. 24.

³ Stanley's Appeal, 8 Barr, 432.

⁴ Morris v. Wallace, 3 Barr, 323; Lukens' Appeal, 7 W. & S. 61.

⁵ Stanley's Appeal, 8 Barr, 435.

deal with it as to be able to treat it as the money of his principal, or as his own, according to the event.¹

§ 441. In regard to interest upon trust funds, it is an established principle, that a trustee is chargeable with interest whenever through negligence he has suffered it to remain uninvested; and much more so when he has used it for his own purpose.² And, as a general rule, he is allowed six months for the investment of the funds, from the time they came into his hands, during which time interest will not run against him.³ But, except in cases of malfeasance, trustees are only chargeable with simple interest on the sums actually received, the practice of making triennial or other rests in the account, and thus charging them with compound interest has not been adopted in Pennsylvania.⁴ It is provided by statute, that the amount of interest to be paid in all cases by executors, administrators, and guardians, shall be determined by the orphans' court, under all the circumstances of the case; but shall not, in any instance, exceed the legal rate of interest for the time being.⁵ It is, however, by no means settled, that under no circumstances, can a trustee be charged with compound interest; it is a fundamental rule of equity that a trustee

¹ *Myers v. Entriken*, 6 W. & S. 46; *Lukens' Appeal*, 7 W. & S. 61.

² *Fox v. Wilcocks*, 1 Binn. 199; *Findlay v. Smith*, 7 S. & R. 264.

³ *Merrick's Estate*, 1 Ash. 305; *Dietterich v. Heft*, 5 Barr, 91; *Lana v. Keck*, 11 Leg. Int. 31; *Worrell's Appeal*, *Ibid.* 55.

⁴ *Dietterich v. Heft*, 5 Barr, 87. See *Brinton's Estate*, 10 Barr, 408.

⁵ *Purd. Dig.* 210. Courts of equity recognise the distinction between negligence and corruption in the conduct of trustees, and measure the rate of interest accordingly. The consequence of charging the full legal rate of interest in the case of mere *negligence*, would frequently be to compel payment by a trustee of what he could not, in the ordinary course of things, have received; and to give to those interested a profit on their funds which they could not easily have made by their usual mode of investment. Report on the Civil Code, 1830-31. And see *English v. Harvey*, 2 Rawle, 305.

shall not make profit of the fund for himself, and the substitution of interest for profits not ascertainable is but a modification of it; and therefore it would seem, that where a trustee has used the trust fund for his own purpose, he may be chargeable with compound interest, unless he duly account for the profits.¹

§ 442. Trustees are, in general, responsible only for their own acts, and not for those of their co-trustees; and the mere fact that they have executed a joint receipt, will not have the effect of making them jointly liable;² for when the administration of a trust is vested in co-trustees, they all form but one collective trustee; they must, therefore, execute the duties of the office in their joint capacity. Thus, a receipt for money, or a certificate of bankruptcy, &c., must receive the joint signature of the whole body; for the power, interest, and authority of co-trustees in the subject matter of the trust, being equal and undivided, they cannot like executors act separately, but all must join.³ The distinction between executors and trustees, in this respect, is important: an executor joining with his colleague in the signature of a receipt or conveyance, makes it his own; for, as each has a several right to receive the assets, it is unnecessary for them to join; and where they gratuitously assume the character of joint receivers, they agree to trust each other, and become joint accountants; while

¹ Harland's Accounts, 5 Rawle, 331-3. Interest will be compounded, or computed with annual rests, where the trustee is guilty of gross delinquency, or mingles the trust property with his own for his own benefit, or otherwise so uses the trust funds as to justify the belief that he has actually earned interest upon the interest; and the reason for charging compound interest is much stronger, when the trustee refuses to exhibit the accounts, which would show, precisely, what loss or advantage he has derived from the trust funds. 1 Pars. on Cont. 103. And see Lukens' Appeal, 7 W. & S. 62.

² Jones' Appeal, 8 W. & S. 143; 1 Pars. on Cont. 27-8.

³ Vandever's Appeal, 8 W. & S. 409.

no such conclusion is to be drawn from the receipt of trustees who cannot choose but join.¹

§ 443. Even in the case of executors, modern good sense, looking beyond the technical reason of the rule, which was supposed to be applicable to the peculiarity of the trust devolved on them, seems to have broken down the distinction between them and other trustees, by denying that, in reason, an intent to be jointly chargeable is deducible from the mere fact of joining in a receipt. And it is said, that executors who give no bond, and general trustees, are liable only for the amount that comes to their hands; though it is otherwise with administrators, who, by giving bonds, become sureties for each other.²

§ 444. As has been before observed, the courts are empowered to remove trustees in all cases of wilful default or mismanagement of the trust estate, and to appoint new trustees to carry out the purposes of the trust.³ It is not, indeed, every mistake, or neglect of duty, or inaccuracy of conduct of trustees, which will induce the courts to adopt such a course. But the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.⁴ Thus, the loan of part of the trust funds on personal security, is sufficient to authorize the dismissal of the trustee for mismanagement.⁵ And so is a refusal on the part of the trustee to undertake additional duties, which are deemed necessary by the court for the proper execution of the trust.⁶

¹ Jones's Appeal, 8 W. & S. 147-8. See Brown's Appeal, 1 Dall. 311; Sterrett's Appeal, 2 Penn. R. 421; Evans's Estate, 2 Ash. 479; Adams' Eq. 58 n.

² Stell's Appeal, 10 Barr, 152-3; M'Nair's Appeal, 4 Rawle, 155; Boyd v. Boyd, 1 Watts, 367.

³ Ante, § 326.

⁴ 2 Story's Eq. § 1289.

⁵ Johnson's Appeal, 9 Barr, 416.

⁶ Carswell's Estate, 12 Leg. Int. 14.

CHAPTER XXIV.

INFANTS, LUNATICS, AND MARRIED WOMEN.

§ 445. ANOTHER important branch of equitable jurisdiction, arising partly out of the doctrine of trusts, and partly from the relation of the parties who are the objects of it, is that which is exercised over the persons and property of infants, lunatics, and married women.¹ And first, as to infants; the jurisdiction over whose persons and estates has been vested by statute in the orphans' courts.²

§ 446. The orphans' courts are invested by law with the power of appointing and removing guardians. The origin of this jurisdiction is found in the act of 27 March 1713,³ which conferred upon them the authority to admit orphans or minors, when and as often as there might be occasion, to make choice of guardians or tutors; and to appoint guardians, next friends, or tutors, over such as the court should judge too young, according to the rules of the common law, to make choice themselves;⁴ provided that they should not have any power to commit the tuition or guardianship of any orphans or minors, to any person or persons, whose religious persuasion should be different from what the parents of such orphan or minor professed at the time of their decease; or against

¹ 2 Story's Eq. § 1327.

² Pu~~bl~~. Dig. 191.

³ 1 Sm. 84-5.

⁴ At fourteen, an infant is at years of discretion, and may choose his guardian.
1 Bl. Com. 463; 1 Bouv. Inst. 63.

the minor's own mind and inclination, so far as he or she had discretion or capacity to express or signify the same; or to persons that were not of good repute; so as others, of good credit and of the same persuasion, might or could be found. Under this act, the appointment of guardians was in the legal discretion of the court, and was not confined to the guardian in soccage or by nurture.¹

§ 447. The provisions of this statute are substantially re-enacted by the revised act of 29th March 1832,² with the further restriction, that no executor or administrator shall be admitted or appointed by the orphans' court the guardian of a minor, having an interest in the estate under the care of such executor or administrator; provided, that such prohibition shall not be construed to extend to the case of a testamentary guardian. The same act provides that no foreign appointment shall authorize the person so appointed to interfere with the estate, or control the person of a minor, in this state; provided, that such foreign guardian may, in its discretion, be appointed by the proper orphans' court, on giving security for the due performance of his trust.³

§ 448. The several orphans' courts have also power to appoint guardians of the estates of minors residing out of the commonwealth, in all cases where such minors are possessed of estates lying within the jurisdiction of the court, upon the petition of the minors, or of any of their relations or friends, or any person interested in such estates, without requiring such minors to appear in court to make choice of guardians.⁴

§ 449. The law which forbids the appointment of a

¹ Graham's Appeal, 1 Dall. 136.

² Purd. Dig. 191.

³ All guardians are treated by the courts as trustees; and except in the case of testamentary guardians, are required to give security for the faithful discharge of their duty. 1 Pars. on Cont. 113.

⁴ Purd. Dig. 191.

guardian whose religious faith differs from that of the infant's parents, should be most strictly obeyed wherever it is practicable, for reasons, so many and so obvious, that they need not be repeated. But a difference of religious opinion is no cause for discharging one from a trust with which he is already clothed. A guardian can only be removed for mismanagement or misconduct. But if he should attempt, by any harsh or unfair means, to erase the impressions made by the parents on the mind of the child, and much more, if he should put its conscience to any kind of torture, the law would not only justify but demand his removal.¹ To disqualify an executor for the appointment of guardian, it is not necessary that the land devised to the minor be placed under his care as executor.² The husband of the widow and administratrix may, however, be appointed guardian of his step-child, after a final settlement of the administration.³

§ 450. The orphans' courts have power to remove any guardian, whether testamentary or otherwise, on proof of his mismanagement of the minor's estate, or misconducting himself in respect to the maintenance, education, or moral interests of his ward.⁴ And ignorance of duty on the part of the guardian, through which the interests of the minor have suffered, is within the mischief to be remedied, and sufficient ground for his removal; for it matters little to an orphan child whether his interests be sacrificed and his prospects blighted by well-meaning ignorance or by wilful malice: either is within the definition of misconduct, a word which applies, not to the motive but to the act.⁵ A complaint against a guardian

¹ Nicholson's Appeal, 8 Harris, 54.

³ Stewart's Case, 1 Browne, 288.

⁵ Nicholson's Appeal, 8 Harris, 54.

² Senseman's Appeal, 9 Harris, 331.

⁴ Purd. Dig. 192.

must be sustained by proof; it is irregular to take the complaint *pro confesso*, because of his refusal to appear to the citation; the proper course is to examine the complainant's witnesses, and judge how far it is sustained by the evidence.¹

§ 451. The superintendency of the guardianship of the person, so as to discharge from illegal custody, or to protect from cruelty or ill usage by the legal guardian, is exercised by the supreme court and the several courts of common pleas on writ of *habeas corpus*. It is principally upon this ground that the courts interfere with the ordinary rights of parents, as guardians by nature, or by nurture, in regard to the custody and care of their children. As a consequence of the obligation of the father to provide for the maintenance and education of his infant children, he is entitled to the custody of their persons, and to the value of their labour and services.² And as between husband and wife, the custody of the children generally belongs to the former. But we have never, in this state, held that the courts are bound to a strict adherence to the old common law rules as to the custody of children. We do not look upon the wife and the children as mere servants of the husband and father, and as therefore held subject to his will, so long as he do not transcend the power of an absolute master. We do not hold that, though a husband drive a wife away from his house by his crimes or his cruelty, still he is entitled to take away from her the custody of her children. We have always, in disputes between parents, acted upon much the same principles as a court of chancery acts, when a petition is presented for the custody of a child;

¹ Shilling's Appeal, 1 Barr, 90.

² 2 Kent's Com. 193.

and as the chancellor, for the king, acts as *parens patriæ* in such cases, so our courts have considered it their duty to act, looking to the good of the child as far as they can, and restraining the absoluteness of the parental right, when exercised inconsistently with this end.¹

§ 452. It is the duty of the parent to maintain and educate the child, and he possesses the resulting authority to control it in all things necessary to the accomplishment of these objects. The law has assigned no limits to the authority of the parent over the child, except that it must not be exercised in such a manner as to endanger its safety or its morals.² This parental authority, however, is always for the good of the child, and therefore is not absolute in all things, or despotic. It must at all times be exercised in subservience to the laws and to the rights of others. A father has no rightful authority to compel his child to prostitute its person, or its morals, to the commission of crime. He dare not force it to commit acts of idolatry or of blasphemy. Against any such parental control, our constitution and laws would at once interpose their authority, and wrest the child from the dangers of such false teachings, and from the influence of such unholy opinions and practices. In every well regulated Christian community, it is obvious that all parental authority must be subject to its institutions and its laws.³

§ 453. In exercising its superintendency over an infant's estate the courts will make a reasonable allowance for maintenance. The orphans' courts are invested, by statute with authority, when any one shall die, leaving an infant child or children, without having made an

¹ *Com. v. Gilkeson*, 3 Am. L. J. 506-7.

² *Com. v. Armstrong*, 1 Penn. L. J. 396.

³ *Com. v. Sigman*, 3 *Ibid.* 255.

adequate provision for the support and education of such child or children during their minority, to direct a suitable periodical allowance out of the minor's estate, for the support and education of such minor, according to the circumstances of each case; which order may, from time to time, be varied by the court, according to the age of the minor and the circumstances of the case.¹ And whenever it shall happen that a devisee, legatee, or distributee, in his or her minority, shall reside out of the state, and the whole or any portion of his or her devise, legacy, or share, shall be necessary for the support, maintenance, or education of such minor, the proper orphans' court is vested with power to make such order touching the payment of the same, or of part thereof, for the use and benefit of such minor, as shall appear necessary and proper: such payment to be made to the persons designated by the court.² And the courts may make such order for maintenance notwithstanding any direction to accumulate the rents and profits for the benefit of the minor.³

§ 454. An allowance for maintenance will be ordered, notwithstanding the infants may have a father in full life, if he be without adequate means to maintain and educate them, according to their future expectations in life.⁴ Courts of equity will direct the maintenance of infants from the funds in the hands of trustees: 1. Where a legacy has been given by a parent to a child, an infant: in which case, whether the legacy be vested or contingent, interest is given for maintenance, on the principle of the natural obligation of parents to provide for the present as well as the future maintenance of their children: 2.

¹ Purd. Dig. 192.

² Ibid. 193.

³ Ibid. 701; *Newport v. Cook*, 2 Ash. 342.

⁴ *Newport v. Cook*, 2 Ash. 332; 1 Pars. on Cont. 256.

Where a legacy has been given by a party who puts himself *in loco parentis*; the intent to do which appearing from the face of the whole will in which a legacy is given, the same doctrine holds as in the case of a legacy to a child by a parent: 3. Where a legacy has been given to an infant absolutely, payable however at full age, with no devise over; no person being in any way interested *in presenti* or *in futuro* in the fund. In such a case, there can be no doubt but that a court of equity will compel a trustee, holding such a fund to appropriate or pay the interest, where the legacy carries interest, or even the principal, where it does not, for the support, education, and advancement of the infant.¹

§ 455. As a general rule, the courts, in allowing maintenance, confine it within the limits of the income; it is rarely permitted to break in upon the capital; yet under circumstances of extraordinary character it will be done.² In *Barlow v. Grant*,³ the rule is thus determined by the Lord Keeper:—"It is fit and reasonable," says his lordship, "that part of the principal of a child's legacy of one hundred pounds should be allowed for his education. The money laid out in the child's maintenance and education is most advantageous and beneficial for the infant, and therefore he should make no scruple in breaking into the principal, where so small a sum was devised, that the interest thereof would not suffice to give the legatee a competent maintenance and education. But in the case of a legacy of one thousand pounds, or the like, there it is reasonable, to restrain the maintenance to the interest money."

§ 456. The courts also exercise a vigilant supervision

¹ *Corbin v. Wilson*, 2 Ash. 207; *Seibert's Appeal*, 7 Harris, 54-5; *Bitzer v. Hahn*, 14 S. & R. 237; *Magoffin v. Patton*, 4 Rawle, 119.

² *Potts's Case*, 1 Ash. 344.

³ 1 Vern. 255.

over guardians in the management of the property of the infant. They will not ordinarily be permitted to change the personal property of the infant into real estate; such a conversion of it can only be justified by imminent necessity.¹ Nor can they effect a conversion of the infant's real estate into personalty, for this would not only affect the rights of the infant himself, but also of his representatives, if he should die under age.² The courts, however, have power in all cases to direct the real estate of minors to be sold, mortgaged, leased, or conveyed on ground rent, wherever it will be for the interest and advantage of those interested therein.³ And such sale will not effect a conversion of the real estate, but the proceeds thereof, except so far as they may be required for the payment of liens, the improvement of the estate, or the maintenance and education of the parties, will be held for the same uses as the real estate had previously been holden.⁴

§ 457. The supreme court and the several courts of common pleas are expressly invested, by the constitution of Pennsylvania, with the powers of a court of chancery, so far as relates to the care of the persons and estates of those who are *non compos mentis*.⁵ And the manner of exercising this jurisdiction by the courts of common pleas has been regulated by the act of 13th June 1836.⁶ These proceedings may be had upon the application in writing of a relative by blood or marriage of the alleged lunatic, or of a person interested in his estate, or where he has no relative by blood or marriage residing within the state, of some disinterested person of the same township, ward, or borough, in which the supposed lunatic resides. The

¹ Royer's Appeal, 1 Jones, 36.

² Purd. Dig. 200-3; Ibid. 699.

³ Const. of Penn. Art. 5, § 6. Purd. Dig. 13.

⁴ 2 Story's Eq. § 1357.

⁵ Ibid. 700.

⁶ Purd. Dig. 550.

petition must be accompanied by an affidavit of the truth of the facts therein stated. And the jurisdiction to issue a commission in the nature of a writ *de lunatico inquirendo*, is vested in the court of the county in which the supposed lunatic resides; or, if he have no residence within the state, in the court of the county in which he may be found; or, if an inhabitant of the commonwealth be absent therefrom, in the court of the county in which he had his last place of residence, or in which he may have any real estate. It is in all cases to be executed in the same county, unless the alleged lunatic be under restraint, in any place within the commonwealth, out of the county of his residence, and he cannot be conveniently removed to his place of residence.¹

§ 458. The inquisition is had, and the question of alleged lunacy is tried by a jury, whose finding is conclusive upon the fact of lunacy, in that proceeding, unless traversed by the party aggrieved. Upon the return of any inquisition finding the person to be a lunatic, the court proceeds to commit the custody and care of his person or estate, or of both, to such person or persons as it deems most suitable. Such committee must give security for the faithful performance of his trust, and is removable by the court in its discretion. The management of the estate and the application of the income are the only things the committee may do without the precedent authority of the court. It is a naked power, and that carefully limited and restrained, that is intrusted to the committee, without any interest whatever in the estate.²

§ 459. This jurisdiction is not confined to idiots or lunatics, strictly so called,³ but is extended to all persons

¹ Purd. Dig. 550.

² Black's Case, 6 Harris, 437.

³ See Beaumont's Case, 1 Wh. 52.

of unsound mind, whether they may have been so from their nativity as idiots, or may have become so from any cause whatever. It is also extended by the act of assembly to habitual drunkards;¹ that is, to such persons who have acquired a fixed habit of intemperance; for occasional acts of drunkenness do not make one an habitual drunkard within the meaning of the statute.²

§ 460. We will now proceed to consider the jurisdiction of courts of equity in relation to married women. "The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union. From this principle it follows, that at law, no contracts can be made between the husband and wife without the intervention of trustees; for she is considered as being *sub potestate viri*, and incapable of contracting with him; and except in special cases, within the cognizance of equity, the contracts which subsisted between them prior to the marriage are dissolved."³ It is also a settled rule of the common law, that the husband becomes entitled, upon the marriage, to all the goods and chattels of the wife, and to the rents and profits of her lands, and he becomes liable to pay her debts and perform her contracts.⁴

§ 461. Courts of equity, on the contrary, treat the husband and wife, for many purposes, as distinct persons, capable of contracting with each other, and of having separate estates and interests.⁵ And we have seen,⁶ that in this state, a married woman, since the act

¹ Purd. Dig. 550.

² *Ludwick v. Commonwealth*, 6 Harris, 174-5.

³ 2 Kent's Com. 129.

⁴ *Ibid.* 129-30.

⁵ *Duffy v. Insurance Co.*, 8 W. & S. 432-3.

⁶ *Ante*, § 76.

of 1848, is considered as a *feme sole* in regard to her separate estate, whether owned by her before marriage or subsequently acquired. We will examine, in the first place, the cases in which contracts between husband and wife will be recognised and enforced in equity.

§ 462. A contract between husband and wife, before marriage, is in general extinguished, both at law and in equity, by their subsequent union. But an ante-nuptial agreement for a settlement upon the wife, although without the intervention of trustees, and therefore void at law, will be enforced in equity, for the husband becomes thereby virtually a purchaser of his wife's estate; and where the wife, before marriage, gave a bond to her intended husband, that in case the marriage took effect, she would convey to him her estate in fee, the contract was, after the marriage, enforced in equity, though void at law.¹ And it may be laid down as a rule, that where the agreement is such, that it cannot create a debt, or raise a demand during the coverture, the marriage will not extinguish the agreement.²

§ 463. As the legal existence of the wife is merged in the husband, a conveyance by the husband to the wife, without the intervention of a trustee, is certainly void at law;³ but where a gift to the wife is reasonable, and not in fraud of creditors, equity sustains it as a provision for her, to which the interposition of a trustee is not indispensable; yet in consideration of the facility with which evidence of it may be fabricated, resting, as it usually does, on the testimony of witnesses domesticated in the family, and tinctured with the prejudices and par-

¹ Cannel v. Buckle, 2 P. Wms. 243; 2 Eden, 252.

² 4 Bouv. Inst. 270; Gackenbach v. Brouse, 4 W. & S. 546.

³ Stickney v. Borman, 2 Barr, 68.

tialities of its members, a chancellor exacts clear and convincing proof of the act of donation and delivery, followed by the same custody that a wife has of her wardrobe or the ornaments that belong to the person: in fine, distinct proof of what would constitute a gift to any one else.¹

§ 464. But there must be some meritorious or valuable consideration, either before or after marriage, to induce the court to lend its aid to a defective or void conveyance.² And therefore, if it appear to be more than a reasonable provision for her, taking into consideration the circumstances of the husband, as, for instance, where he by deed grants all his estate or property to her, or is at the time of the conveyance to her largely indebted in proportion to his means, the deed will be held inoperative in equity, as it would at law; for it could in no just sense be deemed a reasonable provision for her, which is the utmost, as it is said, that courts of equity will hold a wife entitled to.³

§ 465. So, a wife may become a creditor of her husband by acts and contracts during marriage; and her rights as such will be enforced against him and his representatives. As, for instance, if a wife should unite with her husband to pledge her estate, or otherwise to raise money out of it to pay his debts or meet any other occasion for his accommodation, whatever may be the mode or form adopted to carry such purpose into effect, the transaction will, in equity, be treated according to the true intent of the parties.⁴ And a married woman, having a separate estate, may dispose of the income of

¹ *Herr's Appeal*, 5 W. & S. 499; *McKennan v. Phillips*, 6 Wh. 571; *Fisher v. Filbert*, 6 Barr, 66; *Duffy v. Insurance Co.*, 8 W. & S. 433.

² *Stickney v. Borman*, 2 Barr, 68.

³ *Benedict v. Montgomery*, 7 W. & S. 242; *Stickney v. Borman*, 2 Barr, 68-9.

⁴ *Duffy v. Insurance Co.*, 8 W. & S. 433.

it, at her pleasure, either by gift or loan, as well to her husband as to a stranger: if she loan money to her husband, he is as much bound to repay it as a stranger would be.¹ And by the act of 15th April 1851, it is provided, that it shall be lawful for married women to loan to their husbands money, being of the separate estate of the wife, and to take in security therefor a judgment or mortgage against the estate of the husband, in the name of a third person, who shall act as trustee for such married woman; and that every such security *bonâ fide* taken, to secure such loan or moneys received by the husband from the proceeds of the real or personal estate of the wife, shall be as good and valid in law against the estate of the husband, as though the same had been invested by a trustee appointed by the court.²

§ 466. We will now pass to the consideration of the mode in which a married woman may acquire a separate estate, and as to her powers and interests therein. At common law, a wife could not take or enjoy either real or personal estate separate from or independent of her husband. But by our statute of 1848, it is provided, that every species and description of property, real or personal, which may be owned by or belong to any single woman, shall continue to be the property of such woman, as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman during coverture, by will, descent, deed of conveyance, or otherwise, shall be owned, used, and enjoyed by such married woman as her own separate property.³

§ 467. Of property thus acquired by a married woman, possession is no test of title; she cannot have or use her property exclusively, unless she live apart from

¹ Towers v. Hagner, 3 Wh. 57.

² Purd. Dig. 571.

³ Ibid. 570.

her husband; and it was not the intention of the legislature to compel a separation in order to protect the wife's rights.¹ But it is obvious, that the statute would be the means of protecting and covering the grossest frauds, if the mere fact of the legal title being vested in a married woman were sufficient to protect it from her husband's creditors, or to throw on them the burden of proving that it was purchased with his money. Such a construction, however, has not been placed upon the act. To bring the property of a married woman under its protection, it is made necessary, by the letter, as well as the spirit of the statute, to prove that she *owns* it. She must identify it as property which was hers before marriage; or show how she came by it afterwards. Evidence that she purchased it amounts to nothing, unless accompanied by clear and full proof that she paid for it with her separate funds. In the absence of such proof, the presumption is a violent one that her husband furnished the means of payment. And this rule applies to purchases of real estate as well as personal. No agreement of the husband and wife about the property of either, whether it be made in writing or by parol, can avail against creditors, without proof which will render the fact indubitable, that it was hers independent of all agreements between themselves.²

§ 468. In regard to the wife's power of disposition over her separate property, we have seen,³ that the English rule gives her the entire control of it, so far as her power has not been restricted by the terms of the settlement; but that the contrary doctrine has been established

¹ *Gamber v. Gamber*, 6 Harris, 366.

² *Keeney v. Good*, 9 Harris, 355; *Gamber v. Gamber*, 6 Harris, 366. The rule stated in the text does not apply in an action against a mere trespasser. *Hoar v. Axe*, 10 Harris, 381.

³ *Ante*, § 76.

in Pennsylvania, where it is held that she has no power which is not given to her, either expressly, or by necessary implication.¹ But the act of 1848 has worked a radical and thorough change in the condition of a married woman; she is now considered as a *feme sole*, in regard to her separate estate, and may dispose of it by will, or otherwise.² The statute does not, however, enable her to convey by deed, to which her husband is not a party; and the salutary rule is still in force, which forbids any one from taking title to the wife's property, unless it be conveyed by a deed made not only with her own free consent, but under the protection and by the advice of her husband.³ And if she dispose of her property by will, the statute requires that it be executed in the presence of two or more witnesses, neither of whom shall be her husband.⁴

§ 469. Subject to these restrictions, her power of disposition is unaffected by the coverture, and, unless limited by the terms of the settlement, she may dispose of her separate estate in the same manner as a *feme sole*. She may execute a power of appointment for the benefit of her husband; for, being considered a *feme sole* to the full extent of her power over the property, she must, of course, be permitted to judge for herself as to the particular use she shall make of it, in order most effectually to promote her own comfort and happiness.⁵ If she have no trustee of her separate estate, the act of 25th

¹ *Chrisman v. Wagner*, 9 Barr, 473; *Lancaster v. Dolan*, 1 Rawle, 247; *Thomas v. Folwell*, 2 Wh. 11; *Wallace v. Coston*, 9 Watts, 137; *Cochran v. O'Hern*, 4 W. & S. 100; *Wetherill v. Mecke*, Bright. R. 140-1.

² *Cumming's Appeal*, 1 Jones, 275; *Goodyear v. Rumbaugh*, 1 Harris, 480.

³ *Peck v. Ward*, 6 Harris, 509; *Ulp v. Campbell*, 7 Harris, 361; *Haines v. Ellis*, 12 Leg. Int. 66.

⁴ *Purd. Dig.* 570.

⁵ *Hoover v. Samaritan Society*, 4 Wh. 445, 454.

April 1850, authorizes her to apply by petition to the court of common pleas of the county where she was domiciled at the time of her marriage, for the appointment of a trustee of the same, and the court is thereupon to appoint a trustee of the said estate, not being the husband of the petitioner. The same act enables a married woman to declare a trust in regard to her separate property, in favour of any of her children.¹

§ 470. The act of 4th May 1855, confers a further power on a married woman, whensoever her husband, from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for his wife, or shall desert her; by providing, that in such case, she shall have all the rights and privileges secured to a *feme sole* trader; and that her property, howsoever acquired, shall be subject to her free and absolute disposal during life, or by will, without any liability to be interfered with, or obtained by her husband; and in case of her intestacy, shall go to her next of kin, as if he were previously dead. The same act provides, that whensoever any husband or father, from similar causes, shall neglect to provide for his children, the mother shall have all the rights, and be entitled to claim, and be subject to all the duties reciprocally due between a father and his children; and that she may place them at employment, and recover their earnings, or bind them to apprenticeship, without the interference of such husband, the same as the father could do by law.²

§ 471. In general, the wife cannot bind her person or general property: she is allowed to bind her separate property, because as to that she is considered as a *feme*

¹ Purd. Dig. 571. The act does not authorize the appointment of a trustee of property which was owned by a married woman prior to the act of 1848. Burson's Appeal, 10 Harris, 164.

² Purd. Dig. 1136.

sole.¹ And since, under our statute, all the property of a married woman is to be held and enjoyed by her as her separate estate, she may, in this commonwealth, charge the whole of her estate, by any instrument which she is legally competent to execute, and by which she manifests her intention to charge her own estate. Thus, she may execute a mortgage of her separate property for the debt of her husband, and in such mortgage may waive the limitation given by the act of 1705;² but she cannot enter into a personal obligation for the payment of money, such as a promissory note,³ or a bond and warrant of attorney;⁴ unless such obligation be given for the purchase money of real estate for her separate use.⁵ And by the act of 1848, her separate estate may be made liable for debts contracted for necessaries, either by herself in person or furnished for the support and maintenance of her family.

§ 472. In case of the insanity of a married woman, her husband is authorized, by the act of 28th October 1851, upon giving good and sufficient security to the commonwealth for the faithful performance of his trust, in the court of common pleas of the proper county, to transact all business relating to the management or disposition of his or her real and personal estate, in as full and ample a manner as he might or could do if she were sane, and gave her full consent thereto.⁶

¹ 4 Bouv. Inst. 275.

² *Galway v. Black*, Pittsburgh Leg. J. 6 May 1854; *Ibid.* 11 November 1854.

³ *Mahon v. Gormly*, *Ibid.* 10 February 1855. See 3 Am. L. R. 385.

⁴ *Caldwell v. Walters*, 6 Harris, 82; *Knox v. Flack*, 10 Harris, 338. And see *Bennet v. Smith*, 3 Am. L. J. 138.

⁵ *Patterson v. Robinson*, 3 Am. L. R. 240.

⁶ *Purd. Dig.* 571.

CHAPTER XXV.

DISCOVERY.

§ 473. THERE still remains to be considered the auxiliary or assistant jurisdiction of courts of equity, the most important of which is that of discovery; whereby the plaintiff seeks a disclosure from the defendant, on oath, of the truth of the circumstances constituting the plaintiff's case, as set forth in his bill.¹ By various statutes, the supreme court, the district court of Philadelphia, and the courts of common pleas of Beaver, Bedford, Berks, Blair, Butler, Cambria, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Fayette, Forest, Huntingdon, Jefferson, Juniata, Lawrence, M'Kean, Mercer, Mifflin, Montgomery, Philadelphia, Potter, Schuylkill, Somerset, Tioga, Union, Venango, Warren, and Wayne, are invested with full equity jurisdiction, in all cases of discovery. And the district court of Allegheny, and the courts of common pleas of Lancaster and York, have the jurisdiction of courts of chancery, so far as relates to the discovery of facts material to a just determination of issues, and other questions arising or depending in the said courts.² The several courts of common pleas have also jurisdiction to compel the discovery of the real or personal estate of any defendant in a judgment in such court, in aid of the plaintiff's execution.³

¹ 2 Story's Eq. § 1483.

² Purd. Dig. 305-7, 1070-1, 1125.

³ Ibid. 309-10.

§ 474. Every original bill in equity is in reality a bill of discovery; but the species of bill usually distinguished by that title, is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery, though it may pray the stay of proceedings at law, until the discovery should be made.¹ If therefore discovery alone be sought, without equitable relief, courts of general equity jurisdiction have full power to compel the discovery, if the plaintiff be otherwise entitled to it on general principles.²

§ 475. A plaintiff in equity is entitled to an answer from the defendant to the allegations upon which his claim to relief is founded, whether that relief be at law or in equity; and whether the plaintiff can prove his case by other evidence, or be destitute of the means of establishing it. It is therefore one of the purposes of every bill in equity to obtain this answer or confession, and thereby to aid the effect of the other evidence, which may be produced, if it do not render other evidence unnecessary.³ The right to discovery is founded upon one and the same principle, whether the bill be filed for discovery only, or also for relief.⁴

§ 476. Where a bill prays relief, the discovery, if material to the relief, is incidental to it, and it has been held, that *primâ facie* it must be so intended.⁵ But there is a class of cases, in which relief is sought as consequent upon the discovery; and where, but for the want of such discovery, the remedy at law would be complete. In such cases, the necessity of obtaining a discovery consti-

¹ Mitf. Eq. Pl. 53.

³ Hare on Discovery, 1.

⁵ Hare on Discovery, 8.

² 2 Story's Eq. § 689.

⁴ Wigram on Discovery, § 11.

tutes the sole ground of equity jurisdiction.¹ The bill must contain allegations sufficient to entitle the court to retain it for relief, if the discovery should be effectual; otherwise it will be demurrable.² If in such a bill no discovery be obtained, the jurisdiction fails, and the bill must be dismissed. If, on the other hand, the discovery be effectual, then (as we have already seen) that becomes a sufficient foundation upon which the court may proceed to grant full relief. In other words, where the court has legitimately acquired jurisdiction of the cause for the purpose of discovery, it will, to prevent multiplicity of suits, entertain the suit also for relief.³ If the court have acquired cognizance of the suit for discovery, it will retain it for the purpose of relief, in most cases of fraud, account, accident, and mistake.⁴

§ 477. Where a bill prays relief, the discovery, if material to the relief, being incidental to it, a plaintiff showing a title to relief, also shows a case in which a court of equity will compel a discovery, unless some circumstances in the situation of the defendant render it improper. But where the bill is for discovery merely, it is necessary for the plaintiff to set forth a case in which a court of equity will assume jurisdiction for the purpose of compelling a discovery. This jurisdiction is exercised to assist the administration of justice in the prosecution or defence of some other suit, either in the court itself or in some other court.⁵ There are exceptions to

¹ 2 Story's Eq. § 690. ² Story's Eq. Pl. § 313; Hare on Discovery, 8.

³ Ante, § 124; Story's Eq. § 456, 690; *Bank of United States v. Biddle*, 2 Pars. 53; *M'Gowin v. Remington*, 2 Jones, 63; *Shollenberger's Appeal*, 9 Harris, 340; *Baker v. Biddle*, 1 Bald. 409; 1 Curtis's Com. § 24 a.

⁴ 1 Fonbl. Eq. b. I. ch. i. § 3, note f. p. 12; *Baker v. Biddle*, 1 Bald. 409; *Brooks v. Stolley*, 3 M'Lean, 523.

⁵ Mitf. Eq. Pl. 185-6.

this rule, as where the object of discovery is to ascertain who is the proper party against whom the suit should be brought; but these are of rare occurrence.¹ The allegation of the pendency of a civil action, lays a sufficient foundation for a bill of discovery;² an averment, however, that the discovery is sought in aid of some judicial proceeding, commenced or contemplated, is indispensable, for a court of equity does not compel discovery for the mere gratification of curiosity.³

§ 478. The plaintiff, in a bill of discovery, must in all cases show a title to the discovery which he seeks.⁴ To render an application to chancery for a discovery successful, it must appear distinctly, why and for what purpose the discovery is sought. It is not enough to state that a wrong has been committed, or a right withheld, and then proceed to interrogate the defendant as to the matter in controversy, leaving the connexion between the complaint made and the discovery sought, to conjecture or inference; the complainant must show what end is to be served by the information which he demands.⁵ It is the right, as a general rule, of a plaintiff in equity, to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit. But this right of a plaintiff in equity to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the plaintiff's case, and

¹ 2 Story's Eq. § 1483.

² *Peebles v. Boggs*, 1 T. & H. Pr. 81-2.

³ *Collom v. Francis*, 1 Pars. 533.

⁴ *Washington Insurance Co. v. Grant*, 4 Penn. L. J. 88; *Dull v. Amies*, 2 Miles, 136-7. But it seems to be unnecessary to state particularly the pleadings at law, so as to show what precise issues are pending. *Hinckle v. Currin*, 1 Humph. 74.

⁵ *Waldron v. Bayard*, 11 Leg. Int. 79.

does not extend to a discovery of the manner in which the defendant's case is to be exclusively established, or to evidence which relates exclusively to it.¹

§ 479. The plaintiff must not only show an interest in the subject matter of the bill, but he must also state such a case as renders the discovery material to support or defend his suit.² Where it is apparent, upon the face of the bill, that the action or suit which the plaintiff projects or has instituted, cannot be sustained, the defendant may demur to the bill. The case is thereby reduced to a mere question of law, to determine which, no discovery is needed. The averment of title in the bill, is not of a fact, but of the consequence of facts; and although the plaintiff should allege by his bill that he intends to commence, or has commenced, an action in a court of common law, yet if the court of equity, which must be taken to know the law, be of opinion that the facts stated by the bill are not such as will support an action, a demurrer will be allowed; for unless the plaintiff has a title to recover in an action at law, supposing his case to be true, he has no title to the assistance of a court of equity, to obtain from the confession of the defendant evidence of the case.³ So, if the discovery be sought in aid of a defence at law, the bill must show *how* the discovery is material to the defence; a mere naked averment is not enough.⁴ It may be observed, however, that if it be merely doubtful whether an action will lie upon the case stated, it would seem that the plaintiff will not be denied the benefit of a discovery.⁵

¹ Wigram on Discovery, § 26-7; *Werne v. Berners*, 11 Leg. Int. 78.

² Welford's Eq. Pl. 130.

³ Hare on Discovery, 43; Story's Eq. Pl. § 551-2, 558-9.

⁴ *Lane v. Stebbins*, 9 Paige, 622; *Dull v. Amies*, 2 Miles, 136-7.

⁵ Hare on Discovery, 44.

§ 480. It is only in aid of civil proceedings that a court of equity will compel discovery.¹ If the answer of the defendant might be evidence tending to subject him to punishment by any judicial or competent authority, or to any penalty or forfeiture, or disability in the nature of a penalty, the defendant will not be compelled to make the discovery.² If a question involve a criminal charge, the plaintiff is not entitled to an answer to such question, however material to his case. In the application of this principle it has been held, that a married woman will not be compelled to answer a bill which would subject her husband to a charge of felony; and so far has this been carried, that when the facts are such as a defendant will not be compelled to answer, he cannot be required to answer the attendant circumstances, although they have not such an immediate tendency to criminate.³

§ 481. If a bill seek discovery in aid of the jurisdiction of another court, it ought to appear that such aid is required; for if the court, in which the trial is to be had, can itself compel the discovery required, a court of equity, it is said, will not interfere.⁴ On this ground, the court of common pleas of Philadelphia county will not entertain jurisdiction of a bill of discovery in aid of an action in the district court, which has the same equitable jurisdiction, and is as fully competent to compel the discovery. It is also said, that discovery will not be given in aid of inferior courts, as those of aldermen and justices of the

¹ Wigram on Discovery, § 127.

² Hare on Discovery, 131; 2 Story's Eq. § 1494.

³ *Bank of U. S. v. Biddle*, 2 Pars. 58; *Cartwright v. Green*, 8 Ves. 405; Mitf. Eq. Pl. 193-4; 1 Dan. Ch. Pr. 626.

⁴ *Gelston v. Hoyt*, 1 Johns. Ch. 547; Mitf. Eq. Pl. 186; Hare on Discovery, 119; Wigram on Discovery, § 73 n. This doctrine is denied in *March v. Davidson*, 9 Paige, 580, as to mere bills of discovery; and the weight of authority is said to be against it. See Hare on Discovery, 120 n.

peace; nor will a court of equity be made, in this manner, ancillary to the determination of arbitrators.¹ It is a vexed question, whether such a bill lies in aid of a suit, or defence to a suit, in a foreign court: the opinion of Mr. Justice Story appears to be in favour of sustaining the jurisdiction in such cases.²

§ 482. The situation of a defendant may render it improper for a court of equity to compel a discovery. Thus, a married woman cannot be made a party to a suit for the mere purpose of obtaining a discovery from her, to be made use of against her husband.³ And on the same principle, one standing in a relation of professional confidence to another, as his counsel or attorney, will not be compelled to disclose the secrets of his client. It is now well settled, that the privilege is not confined to cases where a suit is either pending or expected, but extends to all cases where the counsel is applied to in the line of his profession. If, touching matters that come within the ordinary scope of professional employment, he receive a communication in his professional capacity, either from a client, or on his account and for his benefit, in the transaction of his business, he is not only justified in withholding information thus derived, but is bound to do so. And it is not confined to facts communicated verbally or in writing by the client, but extends to such as he has acquired by his own personal observation in consequence of such communication. The rule, however, does not extend to facts coming to the knowledge of the attorney, only as a natural or accidental consequence of his occupying that situation, and not derived by him, either di-

¹ Hare on Discovery, 120.

² Story's Eq. Pl. 311; 2 Story's Eq. § 1495; Hare on Discovery, 120.

³ 1 Dan. Ch. Pr. 195; *Le Texier v. Anspach*, 5 Ves. 222.

rectly or indirectly, in consequence of any confidential communication made to him.¹ And it is confined to those cases where a communication has reference to the subject of the dispute, otherwise, the *party* himself has no general privilege or protection; he is, in other respects, bound to disclose all he knows and thinks respecting his own case; and the authorities therefore are, that he must disclose also the cases he has laid before counsel for their opinion, unconnected with the suit itself.²

§ 483. As the object of the court, in compelling a discovery is, either to enable itself, or some other court, to decide on matters in dispute between the parties, the discovery sought must be material, either to the relief prayed by the bill, or to some other suit instituted, or capable of being instituted. If, therefore, the plaintiff do not show by his bill such a case as renders the discovery which he seeks material³ to the relief, if he pray relief, or do not show a title to sue the defendant in some other court, or that he is actually involved in litigation with the defendant, or liable to be so; and do not also show that the discovery which he prays is material, to enable him to support or defend a suit, he shows no title to the discovery.⁴ It must clearly appear on the face of the bill, especially where the object of the proceeding is to supply the party, asking the discovery, with materials for future contemplated litigation, that the plaintiff has a title to the discovery he seeks; in other words, that he has an interest in the subject matter to which the discovery is attached, capable and proper to be vindicated in some judicial tribunal. If he show no

¹ *Jeanes v. Fridenberg*, 5 Penn. L. J. 68, 70.

² 1 Dan. Ch. Pr. 638; 1 Greenl. Ev. § 240.

³ *Shaffer v. Kinkelin*, 10 Leg. Int. 206; *Allen v. Kyle*, 1 T. & H. Pr. 83.

⁴ Mitf. Eq. Pl. 191.

right of action in any court, he can have no right to discovery in a court of equity. A mere fishing bill will not be entertained.¹

§ 484. Were it not for these restraints, the purchase of a subpoena in equity would confer an inquisitorial power, which would speedily be exercised for the purposes of malicious curiosity or speculative cupidity, and bills of discovery would be filed, not to aid in the determination of issues already formed, but to find out matter for future controversy: no man's title would be safe; no man's business secure.² It has also been determined, that a will of discovery will not lie for matter of which the plaintiff has the same means of information as the defendant; as from the public records.³ But a party is entitled to a discovery of all that is material to his case, without showing that it is necessary.⁴ It is one of the purposes of every bill in equity to obtain a discovery from the defendant, and thereby to aid the effect of other evidence which may be produced, if it do not render other evidence unnecessary.⁵

§ 485. It is clear, that a bill for discovery will not lie against a mere witness. The object, end, and office of a bill of discovery is, to obtain testimony by an appeal to the conscience of the defendant, which the plaintiff could not otherwise procure, and which is material to the establishment of a clear legal right set forth in his complaint. When addressed to the party sought to be charged by the proceeding, his answers, being admis-

¹ *Collom v. Francis*, 1 Pars. 531-3; *Twells v. Costen*, Ibid. 373; *Wigram on Discovery*, § 229; *Story's Eq. Pl.* § 319, 321.

² *Waldron v. Bayard*, 11 Leg. Int. 79.

³ *Baker v. Biddle*, 1 Bald. 417; *Ross v. Lloyd*, 2 Penn. L. J. 323.

⁴ *Peebles v. Boggs*, 1 T. & H. Pr. 79.

⁵ *Hare on Discovery*, 1; *Story's Eq. Pl.* § 324 a.

sions against himself, on oath, compose the highest species of evidence against him. But the answers of a mere witness to a bill of discovery could not be evidence against a third person; because, as to the latter, the whole proceeding would be *res inter alios acta*, a proceeding to which he is an entire stranger, and by which, according to the elementary principles of justice, he ought not to be affected. The answer of such a defendant would not even be evidence against a co-defendant in the same bill.¹ So, a bill of discovery will not lie for the purpose of impeaching the defendant's witnesses;² or for the purpose of discovering the names of his witnesses, or the nature of his evidence.³

§ 486. To this rule as to witnesses, there is one established exception, viz., cases against corporations, where their chief officers may be made parties to a discovery, although no decree be sought or could be had against them. The reason of this exception, which has been considered as a stretch of the authority of the court, to prevent a failure of justice, seems to have sprung from the fact, that a corporation could only answer under its common seal, and therefore could not be indicted for perjury, however falsely it might answer; and from the idea that, though the answers of the officers could not be read in evidence, they might be of use in directing the plaintiff how to draw his interrogatories to obtain a better answer. But whatever the reasons, the rule itself is well established.⁴

§ 487. There is another class of cases, in which arbi-

¹ Twells v. Costen, 1 Pars. 378; Collom v. Francis, Ibid. 533.

² Allen v. Kyle, 1 T. & H. Pr. 83.

³ Shaffer v. Kinkelin, 10 Leg. Int. 206.

⁴ Twells v. Costen, 1 Pars. 379; Bevans v. The Dingman's Choice Turnpike, 10 Barr, 176.

trators, attorneys, auctioneers, &c., have been made parties to bills, although they might also have been witnesses, and so far seem to form exceptions to the general rule. "These," says Judge Story, "are all founded upon special circumstances, and in general do not seem applicable to mere bills of discovery, but to bills for discovery and relief."¹ The learned commentator might have even gone further and said, that all the decided cases, in which such bills have been entertained, were cases for relief, and in which this class of defendants were liable at least to a decree for costs, arising from their interest in, or fraudulently intermeddling with, the matter in contestation. There can, of consequence, be no objection to a decree against a party so circumstanced, arising from the fact that he might have been used as a witness, instead of being charged as a defendant. It is for the plaintiff to elect, whether he will use him as the one, or charge him as the other, and it does not lie in his mouth to complain, if the plaintiff have made the latter election. A party so circumstanced is not the less a party, because in another form of the controversy he might have been made a witness.²

§ 488. Another party, against whom a discovery will not be enforced, is a *bonâ fide* purchaser of the property in controversy for a valuable consideration, without notice of the plaintiff's title. It is an axiom of chancery, that equity gives no assistance against a *bonâ fide* purchaser without notice. If a court can have a favourite suitor, such an one is an honest purchaser, without notice, in a tribunal administering equity. The rule of *caveat emptor*, applies only to purchasers of defective legal titles. A purchaser of the legal title is not affected

¹ 2 Story's Eq. § 1500.

² Twells v. Costen, 1 Pars. 379-80.

by any latent equity, whether founded on trust, fraud, or otherwise, of which he has not actual notice, or which does not appear on some deed necessary in the deduction of title, so as to amount to constructive notice.¹ What will amount to notice to a purchaser we have already considered.²

§ 489. In Pennsylvania the *bonâ fide* purchaser of an equitable title, with notice, is entitled to the same protection as the purchaser of the legal title;³ because an equitable title comes within the language and design of the recording acts, as fully as the legal estate. But in either case, to entitle himself to this protection, the purchase must not only be *bonâ fide*, and for a valuable consideration, but he must have paid the purchase money.⁴ According to the English rule, there must be execution and payment of the entire purchase money, for there is no protection for partial payment; but this rule has been modified in our state, and the doctrine is here firmly established, that where a man has purchased without notice, and another has an equity, and sues on that equity, he must indemnify the purchaser by refunding what he has been paid by him.⁵ If therefore the defendant have paid the whole of the purchase money, before notice, he will be protected for the whole; if he have paid a part only, he will be protected to the extent of his payments.⁶ How

¹ *Scott v. Burton*, 2 Ash. 329; *Reed v. Dickey*, 2 Watts, 466; *Kramer v. Arthurs*, 7 Barr, 170; *Sergeant v. Ingersoll*, Ibid. 345. And see *Gibblehouse v. Stong*, 3 Rawle, 456-7; *Juvenal v. Patterson*, 10 Barr, 283.

² Ante, § 113-117, 322.

³ *Bellas v. M'Carty*, 10 Watts, 13, 29; *Beck v. Uhrich*, 1 Harris, 636-9.

⁴ *Bellas v. M'Carty*, 10 Watts, 29.

⁵ *Youst v. Martin*, 3 S. & R. 429; *Bellas v. M'Carty*, 10 Watts, 29; *Lewis v. Bradford*, Ibid. 82.

⁶ *Juvenal v. Jackson*, 2 Harris, 524. And see *Jackson v. Summerville*, 1 Harris, 360, 371; *Beck v. Uhrich*, Ibid. 639; *Bolton v. Johns*, 5 Barr, 149; *Wolbert v. Lucas*, 10 Barr, 73.

far a partial payment will protect a *bonâ fide* purchaser, without notice, from making a discovery, does not appear to have been considered or decided.

§ 490. If the bill, however, as it usually does, state facts from which notice of an adverse claim may be inferred, it is not sufficient to plead a purchase without notice, actual or constructive; but the defendant must, by a full, clear, and substantial answer, (not merely as to knowledge and belief) as well as by averment in his plea, deny the facts from which notice is inferred—though he need not go beyond what is alleged, and rip up his whole title—and must plead that the vendor was in possession by himself or tenant; and that he had no notice before the conveyance, and before the purchase money actually paid, not merely secured to be paid. It is still left open to the other party to contradict the denial. This often occurs on a bill for discovery, or for an injunction; when adverse possession is alleged as notice.¹

§ 491. This principle is not confined in its application to a purchaser from a trustee without notice; for if a stranger, without notice, should purchase for a valuable consideration from one who had taken from a trustee with notice; or if he himself, unless he were the original trustee, having notice, should purchase from one who had taken for a valuable consideration without notice, he would be allowed to hold the estate discharged from the trusts;² the rule being, that if the first purchaser had no notice, a second purchaser from him holds the land discharged of a trust, although such second purchaser had notice of it;³ for otherwise, an innocent purchaser with-

¹ *Lewis v. Bradford*, 10 Watts, 80; *Beck v. Uhrich*, 1 Harris, 639.

² *Jeremy's Eq.* 93.

³ *Bracken v. Miller*, 4 W. & S. 113.

out notice might be forced to keep the estate, and could not sell it.¹

§ 492. It is well settled by reason and authority, that a judgment creditor is not entitled to the protection of a purchaser of the legal title against an equitable owner, or his creditors; and the reason given for it, that lien is an incident, but not the object of judgment, is practically as well as theoretically true.² A judgment creditor has neither *jus in re*, nor *ad rem*; and therefore, though he release all his right to the land, he may afterwards take it in execution. All that he has by the judgment is a lien on the land, but *non constat* that he will ever make use of it, for he may recover the debt out of the defendant's goods by *fieri facias*; besides, the judgment creditor does not lend his money on the immediate security of the lands, as a mortgagee does; but a person is as often trusted on the security of his person and effects, as of his lands; nor is the creditor deceived or defrauded though the cognizor of the judgment had before made twenty mortgages of his real estate.³

§ 493. So assignees in trust for the benefit of creditors, being mere volunteers, are regarded but as the agents of the assignor, standing in his place, and consequently, as a general rule, take only such rights and interests as he himself had and could claim at the time of the assignment. Such a voluntary assignment by a debtor is, in this respect, like the assignment of a bankrupt or insolvent, which passes nothing more than they possessed or enjoyed, and under which the assignee takes their rights, precisely in the same plight and condition

¹ *Harrison v. Forth*, Prec. Ch. 51.

² *Reed's Appeal*, 1 Harris, 478; *Cadbury v. Duval*, 1 Am. L. R. 109.

³ *Coven v. Black*, 1 Barr, 493-5; *Rodgers v. Gibson*, 4 Yeates, 112; *Heister v. Fortner*, 2 Binn. 46.

as they themselves respectively had them. Nor will an agreement to execute a release constitute the parties to such an assignment, purchasers for a valuable consideration, or entitle them to the protection extended by courts of equity to such purchasers.¹

§ 494. The bill of discovery, in aid of an execution at law, given by the act of 1836,² lies only in the court of common pleas of the proper county; neither the supreme court³ nor the district courts have jurisdiction in such cases.⁴ It must be borne in mind, however, that since this point was decided, those courts (with the exception of the district court of Allegheny) have been invested by statute with all the jurisdiction for the discovery of facts that is possessed by courts of chancery;⁵ and it may be questioned, whether this jurisdiction has not been thereby conferred. Such discovery may be compelled as well against a corporation, as an individual defendant;⁶ but a sequestrator is the only person who can have such remedy against a corporation; a judgment creditor is confined to his sequestration.⁷ And such a bill is maintainable to discover the money and choses in action of the defendant, as well as his real and personal estate.⁸

§ 495. Such bill may be filed against the defendant in the judgment, and against any person having possession of his real or personal estate, or who may owe, or be accountable for the same, or may have knowledge of the same, and must be filed in the court of common pleas of the county in which the judgment may be; or if the

¹ Ludwig v. Highley, 5 Barr, 132, 137; Pierce v. M'Keehan, 3 W. & S. 283-4; Luckenbach v. Brickenstein, 5 W. & S. 149; In re Wilson, 4 Barr, 430.

² Purd. Dig. 309.

³ Davis v. Gerhard, 5 Wh. 466.

⁴ Gouldy v. Gillespie, 4 Penn. L. J. 91.

⁵ Purd. Dig. 307, 1055.

⁶ Large v. Bristol Transportation Co., 2 Ash. 394.

⁷ Bevans v. The Turnpike, 10 Barr, 174.

⁸ Ibid.

person of whom discovery is sought, reside out of such county, the bill may be filed in the court of common pleas of the county where such person resides. The bill must set forth: 1. The recovery of a judgment, and the amount actually due thereon: 2. That there is reason to believe that the defendant in the judgment has real or personal estate, wherewith the same may be satisfied: 3. That such real estate has been conveyed, transferred, or incumbered; or that such personal estate has been removed, transferred, or concealed; or that by reason of concealment, or fraudulent transfer, or incumbrance thereof, the complainant is prevented from having execution of his judgment: 4. If the bill be filed against any person other than the defendant in the judgment, it must set forth also, that such person has possession or knowledge of such real or personal estate, or that he can make discovery of such facts as will enable the plaintiff to have satisfaction of his judgment.¹

§ 496. Such bill must be accompanied by an affidavit made by the complainant, or by his agent, or attorney, or some disinterested person on his behalf, that he verily believes the facts set forth therein to be true. And the complainant may, either in the bill, or by interrogatories to be filed therewith, propound to the defendants such questions touching the subject matter thereof, as may be necessary and proper according to the rules and practices of courts of equity.² No person is excused from answering a bill of discovery in relation to the fraudulent concealment of the property of the defendant in a judgment; but the answer cannot be used in evidence in any other suit or prosecution.³

¹ Purd. Dig. 310. See *Large v. Bristol Transportation Co.*, 2 Ash. 394.

² Purd. Dig. 310.

³ Ibid. 396.

§ 497. The act of 26th April 1855, makes it the duty of the auditor-general, whenever he shall have reason to believe that any property is defeasibly held; and is liable, upon office found, to accrue to the state treasury, in consequence of an alienation in mortmain, or otherwise, contrary to the provisions of the laws regulating the holding of property by corporations, charities, ecclesiastical persons, and others; or that the income of any corporation or unincorporated association exceeds the limits allowed by law; to call upon all officers and trustees thereof, to make, within thirty days, a true return and exhibit of all their property, and the annual income thereof; and if no return be made within such time, or the same be unsatisfactory to him, he is required to cause a bill of discovery to be filed in the supreme court, or in any court of the proper county having equity jurisdiction, against the officers or trustees of any such corporation or association, which the defendants therein must answer under the compulsion usual in such cases; and their answers may be used in any proceeding to assert the rights of the commonwealth.¹

¹ Purd. Dig. 1120. .

CHAPTER XXVI.

PERPETUATION OF TESTIMONY.

§ 498. THE supreme court and the several courts of common pleas, are directly invested, by the constitution of Pennsylvania, with the powers of a court of chancery, so far as relates to the perpetuation of testimony, and the obtaining of evidence from places not within the state;¹ and the same powers are conferred, by statute, on the several district courts.² Courts of equity are ever anxious to avoid litigation where it may be entered upon for oppressive purposes, and therefore, of course, are willing to lend their aid in obtaining and recording evidence, in maintenance of the legal right of a party out of possession, which it may be desirable to establish, but respecting which a right of action has not hitherto accrued; and more so where the party is in possession, and he anticipates proceedings at law against him upon a present apparent right, but the power of commencing them lies in his adversary, who postpones the attempt for the very purpose of delaying the investigation, until the party in possession shall have lost the means of defence, in consequence of the death of his witnesses.³

§ 499. The jurisdiction, in suits to perpetuate testimony, arises where the fact, to which the testimony re-

¹ *Purd. Dig.* 13, 305.

² *Ibid.* 306, 1055.

³ *Jeremy's Eq.* 273.

lates, cannot be immediately investigated at law; and therefore courts of equity do not, in general, entertain bills to perpetuate testimony, for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of justice.¹ A bill to perpetuate the testimony of witnesses, must state the matter touching which the plaintiff is desirous of giving evidence, and must show that he has some interest in the subject, and pray leave to examine witnesses touching the matter so stated, to the end that their testimony may be preserved and perpetuated. It ought also to show that the facts to which the testimony of the witnesses, proposed to be examined, is conceived to relate, cannot be immediately investigated in a court of law, as in the case of a person in possession without disturbance.²

§ 500. The interest of the plaintiff in the subject matter, must be more than a mere expectation, for such, in point of fact, is no interest in contemplation of law; and therefore, that of the future heir or next of kin of a person living, although the latter should be a lunatic, will not be sufficient. But upon a present actual interest, however small in value, and however distant the possibility of possession, and whether it be vested or contingent, the court will interfere.³ And it seems another requisite to a bill of this kind, that it should state that the defendant has, or that he pretends to have, or that he claims, an interest to contest the title of the plaintiff in the subject of the proposed testimony.⁴

§ 501. If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit will be

¹ 2 Story's Eq. § 1507.

³ Jeremy's Eq. 274.

² Mitf. Eq. Pl. 51-2.

⁴ Mitf. Eq. Pl. 53.

entertained. But if the party who files the bill, can by no means bring the matter in question into present judicial investigation, (which may happen, when his title is in remainder, or when he is himself in possession) then courts of equity will entertain such a suit; for otherwise, the only testimony which could support the plaintiff's title might be lost by the death of his witnesses. Where he is himself in possession, the adverse party might purposely delay his claim, with a view to that event. It is therefore generally ground of demurrer to a bill to perpetuate testimony, that it is not alleged by the plaintiff, that the matter in question cannot be made by him the subject of present judicial investigation.¹

§ 502. It is to be observed, that the rule which exists with respect to discovery, where it might subject the defendant to pains, penalties, or forfeitures, does not prevail on this subject, for it seems this assistance will be granted even in cases of a felonious nature, as upon a forged deed.² Nor is it any objection to the action of the court, that the defendant is a *bonâ fide* purchaser for a valuable consideration, without notice; since no discovery is sought from him, and the plaintiff might otherwise lose his rights from mere defect of testimony;³ in such cases it is said, that the court merely records the fact, and that the consequence thereof is another consideration.⁴

§ 503. On a bill to perpetuate testimony, the cause proceeds, as in other cases, by ruling the defendant to answer, and filing a replication thereto;⁵ and the wit-

¹ Angell v. Angell, 1 S. & S. 83; Blaine v. Chambers, cited 1 Wh. 278.

² Jeremy's Eq. 277.

³ 2 Story's Eq. § 1510.

⁴ Jeremy's Eq. 277.

⁵ 2 Dan. Ch. Pr. 948. After the bill is filed, the court, on affidavit of the

nesses may then be examined either before the examiner, or by commission in the country, according to the particular circumstances, as in any other suit.¹ But the cause does not proceed beyond the examination of the witnesses; when that has been completed, it is considered at an end, and the only remaining step is the publication of the evidence;² which is followed, in our practice, by a decretal order, that the depositions, together with all proceedings relative thereto, be entered of record, and that the same be confirmed *in perpetuam rei memoriam*. In case of the loss or destruction of the records of any of the courts of record in this commonwealth, a bill to perpetuate the testimony of such record may be filed, with the same effect as in other cases.³

§ 504. Where a bill is filed to perpetuate the evidence of title to lands, tenements, and hereditaments, in which bill the commonwealth is a necessary party, it is provided by statute, that the process may and shall be served on the attorney-general, or his deputy, for the proper county, whose duty it shall be to attend to the interests of the commonwealth in the premises.⁴ All

facts stated in the bill, and that the witnesses are material, will, on motion or petition, order the witnesses to be examined *de bene esse*. Eq. Draftsman, 361.

¹ Gresley's Eq. Ev. 132.

² Adams' Eq. 24. Where a bill is filed against a married woman, to perpetuate evidence against a title that she might set up, and her husband is not made a party, because he is supposed, and alleged in the bill, to be dead; and at the taking of the evidence, counsel appears for the defendant, and the husband also is present and examined as a witness, and the decree of perpetuation is made without any objection having been stated, on account of the husband not being a party with his wife; it is too late to raise the objection, when the controversy has arisen, and the testimony is offered to be read; for married women are bound by the judgment of courts, in adversary proceedings, in which they are entitled to appear, just as other people are. *Couch v. Sutton*, Sup. Court, 3 Pittsburgh Leg. J. 60-1.

³ Purd. Dig. 305.

⁴ Ibid. 308.

the duties of the deputies of the attorney-general, are now directed to be performed by the district attorneys.¹

§ 505. The act of 28th March 1786,² as we have already seen,³ provides for the perpetuation of the evidence of deeds lost or destroyed before its passage.⁴ Under that act and its supplements, the plaintiff may apply by bill or petition to the supreme court, or to the court of common pleas of the proper county, setting forth the facts of the case; whereupon the court, upon affidavit being made of the material facts, is empowered to issue a subpoena to the persons appearing to be interested in the matters contained in the bill or petition, if residing within the state; and if residing without the state, the court may direct an advertisement to be published for three weeks, or more, in some public newspaper, giving notice of the application, and requiring all persons whom it may concern, to appear and answer the bill or petition: when the answer is filed, or in default of an answer, the court or the judges in vacation, may examine the witnesses or cause their depositions to be taken, and have such other proceedings in a summary way to establish the facts, and make such order and decree in the premises as to justice and equity shall appertain.

§ 506. The statute further provides, that the record of such proceedings, or a copy thereof duly certified, may be read in evidence, upon any trial or controversy respecting the premises mentioned in the bill or petition; and that all the costs of such proceedings shall be at the expense of the parties exhibiting the bill or petition.

§ 507. Bills to take testimony *de bene esse*, and bills to take the testimony of witnesses resident abroad, consti-

¹ Purd. Dig. 240.

² Ibid. 230.

³ Ante, § 36-7.

⁴ Smith v. Bonsall, 5 Rawle, 88.

tute another important branch of the assistant jurisdiction of courts of equity. But under our system, these powers are vested in all the courts of common law, and are exercised by them by means of commissions to take testimony, and rules for the examination of witnesses, without any resort to chancery forms of proceeding, except the filing of interrogatories. They do not, therefore, fall within the design of this work; and the student is referred, for a knowledge of the learning involved in such cases, to Troubat and Haly's Practice in the Courts of Pennsylvania, where the whole subject is discussed by the learned editor with his accustomed ability.

BOOK II.

EQUITY PLEADING AND PRACTICE.

CHAPTER I.

PARTIES.

§ 508. WE will now proceed to the consideration of the second division of our subject, namely, the pleadings and practice in a suit in equity. And here it is proper to premise, that in all cases, where the rules adopted by our courts do not apply, their practice is regulated by that of the supreme court of the United States, or of the high court of chancery in England, so far as it may reasonably be applied, consistently with the local circumstances and local convenience of the district in which the court is held; not as positive rules, but as furnishing just analogies to regulate the practice.¹

§ 509. A suit in equity is commenced by preferring a bill, in the nature of a petition, to the judges of the court, containing a statement of the plaintiff's case, and praying the relief which he considers himself entitled

¹ Equity Rules, lxxxiv. p. 145. This is the rule adopted by the supreme court of the United States; and our statute provides, that our courts shall exercise their equity powers, according to the practice prescribed or adopted by the supreme court of the United States, unless it be otherwise provided by act of assembly, or the same shall be altered by the supreme court of this commonwealth, by general rules and regulations. *Purd. Dig.* 307.

to receive. This is termed an original bill, to distinguish it from other bills, filed in the course of a suit to remedy defects and errors. Before presenting such a bill, it is obviously of the greatest importance to consider who ought to be made parties to it, whether as plaintiffs or defendants. And we may observe, that it is a general rule, subject to very few exceptions, that all persons *sui juris* can sue and be sued in chancery, unless they are subject to some absolute or temporary disqualification, which will presently be considered.¹

§ 510. Thus, the commonwealth has the same right which a citizen has, to institute proceedings in its own courts, for the assertion of any right which it claims, either on behalf of itself or others; and the same principles which entitle a citizen to the assistance of a court of equity, to enable him to assert his legal rights, are equally applicable to the commonwealth.² If the suit immediately concern the rights of the commonwealth, it is instituted by the attorney-general; and as this officer acts officially, the bill he exhibits is by way, not of petition or complaint, but of information to the court, of the rights which the commonwealth claims on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted. If the suit do not immediately concern the rights of the commonwealth, its officers depend on the relation of some person, whose name is inserted in the information, and who is termed the relator; and as the suit is carried on under his direction, he is considered as answerable to the court and to the parties for the propriety of the suit and the conduct of it.³ The state cannot, however, be made a party

¹ 4 Bouv. Int. 289.

² 1 Dan. Ch. Pr. 3.

³ Mitf. Eq. Pl. 22. A foreign government may maintain a suit in equity,

to a suit, without its consent expressed by a law or resolution, and no judicial proceeding or process, by or against the attorney-general, unless by the authority of the state, can prejudice its rights.¹

§ 511. The right to sue is not confined to persons in their natural capacities; the power to sue and be sued is a power inseparably incident to every corporation, whether sole or aggregate.² So also, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdictions, when they are not contrary to the known policy of the state or injurious to its interests;³ and such foreign corporations may sue in a court of equity in their corporate name and capacity. In pleading, it is not necessary that they should set forth the proper names of the persons who form such foreign corporation, or show how it was incorporated; though if it be *denied*, they must prove that by the law of the foreign country they were effectually incorporated.⁴

§ 512. The rule that all persons, not lying under the disabilities after pointed out, are entitled to maintain a suit as plaintiffs in a court of equity, is not affected by the circumstance of their being resident out of the jurisdiction of the court, unless they be alien enemies. In order, however, to prevent the defendant from being defeated of his right to costs, it is a rule, that if the plaintiff in a suit be resident abroad, the court will, on appli-

but the jurisdiction in such cases is conferred upon the federal courts, by the Constitution of the United States. Purd. Dig. 5.

¹ Magill v. Brown, Bright. R. 404.

² 1 Dan. Ch. Pr. 25; 1 Bl. Com. 477.

³ Bank of Kentucky v. Schuylkill Bank, 1 Pars. 225.

⁴ 1 Dan. Ch. Pr. 29; Stewart v. United States Ins. Co., 9 Watts, 126; Zion Church v. St. Peters' Church, 5 W. & S. 215; Lehigh Bridge Co. v. Lehigh Coal and Navigation Co., 4 Rawle, 24; Grubb v. Mahoning Navigation Co., 2 Harris, 304.

cation of the defendant, order him to give security for the costs of the suit, and in the mean time direct all proceedings to be stayed. But a plaintiff cannot be compelled to give security for costs, unless he himself state upon his bill that he is resident out of the jurisdiction, or unless the fact be established by affidavit; and it seems, that the mere circumstance of his having gone abroad, will not be sufficient ground on which to compel him to give security, unless it be stated, either by the plaintiff himself or upon affidavit, that he is gone abroad for the purpose of *residing* there.¹

§ 513. If the plaintiff, after filing a bill, leave the jurisdiction for the purpose of settling, and do actually take up his residence in foreign parts, it is, in every stage of the cause, ground for an order that he shall give security for costs. But in order to entitle a defendant to require security for costs from a plaintiff, he must make his application at the earliest possible time after the fact has come to his knowledge, and before he takes any further step in the cause. Should the plaintiff's non-residence appear from the face of the bill, the defendant must make his motion before he puts in his answer, or applies for time; either of which acts will be considered as a waiver of his right to security. Even filing an answer, after notice of the fact of the plaintiff's residence abroad, though sworn to before, has been held a waiver of security for costs. And equal vigilance and promptness of application is required, where the plaintiff removes after filing his bill.²

§ 514. According to our practice, the amount of security required, is fixed by the court at the time of making the order; and the security is taken by the prothonotary

¹ 1 Dan. Ch. Pr. 35-6.

² M'Garry v. Crispin, 4 Penn. L. J. 354-5.

upon notice to the defendant's solicitor. The following is the form of the bond:—

“Know all men by these presents, that we, A. B. of the city of Philadelphia, merchant, and C. D. of the same place, merchant, are held and firmly bound, unto E. F. (the defendant) in the sum of one hundred dollars, lawful money of Pennsylvania; to which payment well and truly to be made, we do bind ourselves and each of us, our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, &c. Whereas G. H. of the city of New York, plaintiff, has lately exhibited his bill of complaint, in the court of common pleas of Philadelphia county, sitting in equity, touching the matters therein contained. Now the condition of this obligation is such, that if the above bounden A. B. and C. D. or either of them, their heirs, executors, or administrators, do, and shall well and truly pay or cause to be paid, all such costs as the said court shall think fit to award to the defendant, on the hearing of the said cause or otherwise, then this obligation to be void, or else to remain in full force and virtue.”

§ 515. The disabilities, by which a person may be prevented from suing, may be divided into two sorts; namely, such as are absolute, and during the time they last effectually deprive the party of the right to assert his claim; and such as are qualified, and merely deprive him of the power of suing without the assistance of some other party to maintain the suit in his behalf. Of the first sort are the disabilities which arise from alienage, outlawry, attainder, bankruptcy, and insolvency; of the second sort are those which arise from infancy, coverture, and lunacy.¹ With respect to aliens, in general, it is to be observed, that

¹ 1 Dan. Ch. Pr. 52.

although by the old law no alien, whether friend or enemy, could maintain a suit, yet the necessity of trade has discouraged and gradually done away with the too rigorous restraints and discouragements which formerly existed; and it is now clear, that an alien born, provided he be not an alien enemy, may sue in the courts of this state; provided the subject matter of the suit be such as will entitle him, as an alien friend, to maintain it.¹

§ 516. The disability to maintain a suit on account of alienage, outlawry, and attainder, arises partly from the plaintiff being personally disqualified, and partly from his not being capable of holding the property which is the object of the suit. That which accrues from bankruptcy or insolvency arises from the latter cause only, or rather from the fact, that by the bankruptcy or insolvency, all the bankrupt's or insolvent's property, whether in possession or action, is vested in his assignees. They are not, however, personally disqualified from suing; and in many cases sustain suits either at law or in equity.² If a plaintiff become a bankrupt or insolvent after the institution of the suit, this does not strictly cause an abatement, but renders the suit defective; and the defendant, if he wish to get rid of the bill entirely, must move that the assignees may, within a certain time after notice of the order, make themselves parties to the suit by filing an original bill, in the nature of a supplemental bill, or in default thereof, that the plaintiff's bill may stand dismissed.³

§ 517. We come now to the consideration of those disqualifications, which only incapacitate a person from maintaining a suit alone, but do not prevent his suing in

¹ Ibid. 53; Story's Eq. Pl. § 54.

² 1 Dan. Ch. Pr. 69-70.

³ Ibid. 77; Story's Eq. Pl. § 349.

equity, provided his suit be supported by another person.¹ Such disqualifications arise from infancy, coverture, lunacy, and habitual drunkenness. Although an infant is, in general, capable of maintaining a suit, yet on account of his supposed want of discretion, and his inability to bind himself and make himself liable to the costs, he is incapable of doing so without the assistance of some other person, who may be responsible to the court for the propriety of the suit in its institution and progress. Such a person is called *the next friend* of the infant, and if a bill be filed on behalf of an infant without a next friend, the defendant may move to have it dismissed with costs, to be paid by the solicitor.² An infant may sue by his next friend, appointed at the common law, by the court in which the action is pending, and by our practice, without any appointment at all, in order to supply the want of capacity in the infant to afford, in his own person, a party responsible on the record for the costs; and as the execution of the trust is under the supervision and control of the court, there is no reason why our practice of constituting a *prochein ami*, without the express sanction of the court, should be disturbed. Such a next friend is in the nature of a guardian *ad litem*, the chief difference being, that the former is the curator of an infant plaintiff, and the latter of an infant defendant.³

§ 518. Guardians *ad litem* to defend a suit, may be appointed by the court, or by any judge thereof, for infants, or other persons who are under guardianship, or otherwise incapable to sue for themselves; and all infants and other persons so incapable, may sue by their guardian, if any, or by their *prochein ami*; subject, however, to

¹ 1 Dan. Ch. Pr. 88.

² Ibid. 90.

³ Turner v. Patridge, 3 Penn. R. 173; Heft v. M'Gill, 3 Barr, 264.

such orders as the court may direct for the protection of infants and other persons.¹

§ 519. Although it is not necessary, that in bringing a bill against infants, the plaintiff should join any other person with them; yet they are not permitted, on account of their supposed want of capacity, to defend themselves; and therefore, where a defendant to a suit is an infant, the court will appoint a proper person to put in his defence for him, and generally to act on his behalf in the conduct and management of the case. The person so appointed is called "the guardian of the infant," and in the books is generally styled "the guardian *ad litem*," to distinguish him from the ordinary guardian. The duty of such guardian is, to put in the proper defence for the infant; and it seems, that he is responsible for the propriety and conduct of such defence; and if the answer put in by him for the infant, should be reported scandalous or impertinent, he would be liable to the costs of it.²

§ 520. So anxious are courts of equity to protect infants, that a decree cannot safely be obtained against an infant, upon the mere fact of taking the bill *pro confesso*, or upon an answer in form by the guardian *ad litem*. The answer in such cases generally is, that the infant knows nothing of the matter, and therefore neither admits nor denies the charges, but leaves the plaintiff to prove them as he shall be advised, and throws himself upon the protection of the court. A decree upon such an answer will not bind the infant, and he can open it or set it aside when he comes of age. No laches can be imputed to an infant, and no valid decree can be awarded against him merely by default. The plaintiff in every such case ought to prove his demand either in court or

¹ Equity Rules, lxxxix. p. 144.

² 1 Dan. Ch. Pr. 204.

before a master, and the infant is usually entitled to a day, to show cause, when he comes of age.¹

§ 521. With respect to married women, it may be observed, that as in Pennsylvania, all property of a married woman is to be held and enjoyed by her as her separate property; so all suits in equity concerning the property of a married woman, should be instituted by her, as sole plaintiff, by her next friend;² and it is well settled, that a wife may, in a suit concerning her separate property, be the plaintiff against her husband.³ And as a wife may sue her husband in respect of her separate property, so may a husband in a similar case sue his wife. Such suit, however, can only be in respect of his wife's separate estate; for a husband cannot have a discovery of his own estate against his wife.⁴

§ 522. As a general rule, where a suit is instituted against a married woman, her husband must also be a party. But although she cannot institute a suit by herself, and must seek the protection of some other person as her next friend; she may yet, by leave of the court, defend a suit separately from her husband without the protection of another. Thus, if she claim in opposition to any claims of her husband, or if she live separate from him, or disapprove the defence he wishes to make, she may obtain an order to defend the suit separately, and her answer may be read against her. If a husband be plaintiff in a suit, and make his wife a defendant, he treats her as a *feme sole*, and she may answer separately without an order of the court for the purpose. If a married woman obstinately refuse to join in defence with her husband, she may also be compelled to make a

¹ Rogers v. Smith, 4 Barr, 100.

³ 1 Dan. Ch. Pr. 142.

² Story's Eq. Pl. § 63.

⁴ Ibid. 143.

separate defence; and for that purpose an order may be obtained, that process may issue against her separately. Except under such circumstances, a married woman can only defend jointly with her husband.¹

§ 523. Bills on behalf of a lunatic are usually instituted in the name of the lunatic; but as he is a person incapable in law of taking any step on his own account, he sues by the committee of his estate, who is responsible for the conduct of the suit.² All suits by or on behalf of a lunatic, placed by law in the care of a committee, must be in the names of the lunatic and the committee. The latter must join to manage the interests of one who is disabled to protect himself, and the lunatic must be joined because he may recover his understanding, and then he is to have the management and disposal of his estate. He resembles, as to this, an infant, who always appears by guardian or next friend.³ A lunatic, however, is not a necessary party plaintiff with his committee, on a bill to set aside an act done by the lunatic under mental imbecility.⁴ Habitual drunkards are placed, by statute, upon the same footing, in this respect, as lunatics.⁵

§ 524. In like manner, if a person be in the condition of an idiot or lunatic, though not found so by inquisition, or if, by reason of age or infirmities, he be reduced to a second infancy, he may be permitted to sue by next friend; or the court will, upon information, appoint a guardian *ad litem*, to defend a suit against him.⁶ Where one, who was a necessary party plaintiff, had religious

¹ Mitf. Eq. Pl. 104-5.

² 1 Dan. Ch. Pr. 106.

³ Beale v. Com. 2 Watts, 184; Warden v. Eichbaum, 2 Harris, 127; Harrison v. Rowan, 4 W. C. C. 207.

⁴ Ortleby v. Messere, 7 Johns. Ch. 139.

⁵ Purd. Dig. 550.

⁶ 1 Dan. Ch. Pr. 111, 224; Story's Eq. Pl. § 66, 70; Mitf. Eq. Pl. 30.

scruples against becoming a party to any suit, Chancellor Kent said,—“If J. W. have religious scruples which cannot be surmounted, and this shall be made to appear, either by affidavit or the report of a master, perhaps she may be permitted to become plaintiff by her *prochein ami*. A person incompetent to protect himself from age or weakness of mind, or from some religious delusion or fanaticism, *quem urget fanaticus error, vel inacunda Diana*, ought to come under the protection of the court.”¹

§ 525. It is the constant aim of a court of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose, all persons materially interested in the subject ought generally to be made parties to the suit, plaintiffs or defendants, however numerous they may be; so that the court may be enabled to do complete justice, by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigation may be prevented.² This general rule, however, admits of many qualifications, which will presently be considered; and it has been well observed, that it is not all persons who have an interest in the *subject* matter of the suit, but in general, those only who have an interest in the *object* of the suit, who are ordinarily required to be made parties.³

§ 526. One exception to this rule, arises from the im-

¹ *Malin v. Malin*, 2 Johns. Ch. 238.

² Mitf. Eq. Pl. 163-4; 1 Dan. Ch. Pr. 240; Story's Eq. Pl. § 72; *Mathews v. Stephenson*, 6 Barr, 498; *Joy v. Wirtz*, 1 W. C. C. 519; *Wisner v. Barnett*, 4 W. C. C. 642; *Bogardus v. Rosendale Man. Co.*, 3 Seld. 151-2.

³ Calvert on Parties, 5, 6, 10, 11; Story's Eq. Pl. § 72.

practicability of making all the persons interested parties to the suit. Thus, it is a rule of the court, that in all cases where it shall appear that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction, or otherwise incapable of being made parties; or if their joinder would oust the jurisdiction as to the parties before the court; in all such cases, the court may, in its discretion, proceed in the cause without making such persons parties; and the decree shall be without prejudice to the rights of the absent parties.¹ Where any person is out of the jurisdiction of the court, who should be made a party, and that is stated in the bill, the court will, in most cases, proceed without him; and if the possession or power over the property be in the other party, the court will act upon the bill.²

§ 527. If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties, the bill must aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court, as to the other parties. And as to persons who are without the jurisdiction, and may properly be made parties, the bill should pray that process may issue to make them parties to the bill, if they should come within the jurisdiction.³ If however, a person so out of the power of the court is required to be an active party in the execution of its decree, as by the execution of a conveyance, the proceedings will be unavoidably, to this extent, defective.⁴ Thus,

¹ Equity Rules, xlv. p. 127; *Joy v. Wirtz*, 1 W. C. C. 518-19.

² *Mathews v. Stephenson*, 6 Barr, 499.

³ Equity Rules, xxi. p. 119. See *Milligan v. Milledge*, 3 Cranch, 220.

⁴ *Joy v. Wirtz*, 1 W. C. C. 519.

against a foreign corporation, a court of equity in Pennsylvania can exercise no jurisdiction to compel stockholders residing here to pay the stock subscribed to such corporation, on the application of a creditor of the company.¹

§ 528. Another exception to the rule is, where the personal representative of a deceased person is a necessary party, but it is charged in the bill, that there is no such representative; as, where the representation is in litigation in the register's court, or other proper tribunal.² It is the practice, however, in such cases, in Pennsylvania, to grant letters of administration *pendente lite*.³ So, if the bill seek a discovery of the parties interested in the matter in question, for the purpose of making them parties, and charge that they are unknown to the plaintiff, an objection of want of the necessary parties will not prevail.⁴ Such discovery, however, cannot be had against one who is otherwise examinable as a witness, unless he have so acted in the cause as to subject himself to a decree, at least, for the costs; and in such case, the bill must show that the plaintiff is entitled to effective relief, in equity, against the unknown persons who are persons really interested in the question in dispute. Such discovery of parties cannot be had for the mere purpose of proceeding against them at law.⁵

¹ Bank of Virginia v. Adams, 1 Pars. 534.

² Mitf. Eq. Pl. 180; Story's Eq. Pl. § 91.

³ See Com. v. Mateer, 16 S. & R. 416; Ellmaker's Estate, 4 Watts, 36.

⁴ Mitf. Eq. Pl. 180; Story's Eq. Pl. § 92; Bogardus v. Rosendale Manufacturing Co., 3 Seld. 147, 150-1.

⁵ Twells v. Costen, 1 Pars. 382. It is provided by statute, that a bill of discovery in aid of an execution at law, may be filed against the defendant in the judgment, and against any person having possession of his real or personal estate, or who may owe, or be accountable for the same, or may have knowledge of the same; and the costs in such cases are within the discretion of the court. Purd. Dig. 310.

§ 529. Another exception is, where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before the court; in such cases, the court may, in its discretion, dispense with making all of them parties, and may proceed in the suit, having sufficient parties, to represent all the adverse interests of the plaintiffs and defendants in the suit, properly before it. But in such cases, the decree will be without prejudice to the rights and claims of the absent parties.¹ In all cases, within this exception, it is proper to allege in the bill, unless it be apparent upon its face, that the parties are too numerous to make it practicable, even if known, to prosecute the suit, if all of them were made parties.²

§ 530. The general rule, being established for the convenient administration of justice, ought not to be adhered to in cases, in which, consistently with practical convenience, it is incapable of application; for then it would destroy the very purpose for which it was established.³ The result of adhering to it, in cases in which the parties are very numerous, would be, that the door of the court would be shut in all cases in which partners or shareholders are too numerous to be made parties, which in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the citizens of the commonwealth, in some of the most important of their affairs. It is the duty of the court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for

¹ Equity Rules, xlv. p. 128; *Langolf v. Seiberlitch*, 2 Pars. 77.

² Story's Eq. Pl. § 95.

³ *Ibid.* § 96.

which there is no other remedy. This is the ground upon which courts of equity have, in many cases, dispensed with the presence of those who would, according to the general practice, have been necessary parties.¹

§ 531. Where the parties interested are numerous, and the suit is for an object common to them all, it is established, that some of the body may maintain a bill in behalf of themselves and of the others; and such a bill must be distinctly stated to be on behalf of the plaintiff and of the other persons interested, so that they come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing; and the court will entertain a bill or petition to bring the rights of the absent parties more distinctly before the court.² But this is not to be considered as a general principle; it is only in certain cases that it can be done. In order to enable a plaintiff to sue on behalf of himself and others, who stand in the same relation with him to the subject of the suit, it must appear that the relief sought by him is, in its nature, beneficial to all those whom he undertakes to represent; where that does not clearly appear, the bill will not be entertained.³

§ 532. The cases falling under this exception are divided by Judge Story into three classes: 1. Where the question is one of a common or general interest, and one or more may sue or defend for the benefit of the whole: 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend, may fairly be presumed to represent the rights and inte-

¹ *Wallworth v. Holt*, 4 M. & C. 635; 1 Dan. Ch. Pr. 290; *Story's Eq. Pl.* § 96; *Langolf v. Seiberlitch*, 2 Pars. 78.

² *Welford's Eq. Pl.* 56; *Story's Eq. Pl.* § 96; *Joy v. Wirtz*, 1 W. C. C. 418; *Wisner v. Barnet*, 4 W. C. C. 642; *Langolf v. Seiberlitch*, 2 Pars. 77.

³ *Hill v. Commissioners of Kensington*, 1 Pars. 513-14.

rests of the whole: 3. Where the parties are very numerous, and although they have, or may have separate distinct interests, yet it is impracticable to bring them all before the court.¹

§ 533. The first class includes suits by part of the crew of a privateer, on behalf of themselves and the remainder of the crew, against prize agents, for an account and distribution of the prizes made by the ship;² bills by creditors under a deed of trust for the payment of debts on behalf of themselves and others named in the deed, to enforce the execution of the trust;³ and some others, which, however, are of rare occurrence in Pennsylvania, such cases being generally within the statutory remedies provided in cases of trust; or cognizable in the orphans' court, as the distribution of a decedent's estate; or at common law, as by action for recovery of a legacy, which is not charged upon the realty.

§ 534. In the second class is included bills by members of a corporation, against the corporation and its officers, where the act complained of is a violation of law, by a disregard of chartered rights, or a breach of public trust, in the waste or mismanagement of public moneys.⁴ It is certainly not a matter of course for individual members of a corporation to assume to themselves the right of suing in the name of the corporation; generally, where there has been a waste or misapplication of corporate funds by the officers and agents of the company, a suit to compel them to account for such waste or misapplication should be in the name of the corporation. But if it appear that the directors of the corporation refuse to pro-

¹ Story's Eq. Pl. § 97. ² 1 Dan. Ch. Pr. 287. ³ Story's Eq. Pl. § 102.

⁴ *Hill v. Commissioners of Kensington*, 1 Pars. 514; *Bogardus v. Rosendale Manufacturing Co.*, 3 Seld. 151.

secute, by collusion with those who have made themselves amenable by their negligence or fraud; or if the corporation be still under the control of those who must be made the defendants in the suit; the stockholders, who are the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant. And if the stockholders be so numerous as to render it impossible or very inconvenient to bring them all before the court, a part may file a bill on behalf of themselves and all others standing in the same situation.¹

§ 535. The general rule, requiring the presence of all parties interested in resisting the plaintiff's demand, has also been dispensed with in a variety of cases where the parties were numerous, and the ends of justice could be sufficiently answered by a sufficient number being before the court to represent the rights of all, and this, generally, upon the ground, that if the plaintiff succeeded in his demands against the individuals sued, they would not be injured, as they had a remedy over against the others for a contribution, which, under their own regulations, they might enforce; although the enforcement of it, on the part of the plaintiff, against so numerous a body, would be nearly impossible.² Thus it is a rule, that in all cases where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.³

§ 536. The third class of cases within this exception,

¹ *Langolf v. Seiberlitch*, 2 Pars. 77; *Krebs v. Directors of the Carlisle Bank*, 2 Wall. Jr. 33.

² 1 Dan. Ch. Pr. 319, 321.

³ Equity Rules, xlix. p. 129.

includes those in which the parties may have distinct interests, and yet are so numerous as to render it impracticable to bring them all before the court; as a bill brought by the lord of a manor against some of the tenants, or by some of the tenants against the lord, on a question of common; or by a parson for tithes against some of the parishioners, or by some of the parishioners against the parson, to establish a general parochial modus.¹ These are the illustrations of the doctrine generally found in the books, but cases within the same principle may easily be imagined, which are likely to arise under our system of equity jurisprudence.

§ 537. We will now proceed to consider, who are deemed necessary parties, whose joinder in the suit cannot be dispensed with. And here it may be observed, that it is unimportant whether the persons whose interests are to be affected, have a legal or an equitable interest in the subject matter of the suit; or, with certain exceptions, whether such interest be present and immediate, or future and remote, so that it is a fixed interest: in either case, they must be brought before the court, in order to obtain a decree, by which those interests will be affected.² And if the parties actually before the court may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability under the decree, more extensive and direct than if the absent parties were before the court, that of itself will, in many cases, be a sufficient ground for making such absent persons parties to the suit.³

§ 538. There are cases, however, in which certain parties before the court are entitled to be deemed the full representatives of all other persons, at least so far as to

¹ Mitf. Eq. Pl. 170.

² Story's Eq. Pl. § 137.

³ Ibid. § 138.

bind their interests under the decree, although they are not, and cannot be, made parties.¹ Thus, the executor or administrator of a deceased person, is the person constituted by law to represent the personal property of that person, and to answer all demands upon it; and therefore, where the object of a suit is to charge such personal estate with a demand, it is sufficient to bring the executor or administrator before the court.² The assignees of a bankrupt or insolvent debtor are also the proper persons to represent the estates vested in them, under the bankruptcy or insolvency; and therefore, in all cases where claims are sought to be established against the estates of a bankrupt or an insolvent debtor, it is necessary to bring only the assignees before the court, and the bankrupts or insolvents themselves, or their creditors, are unnecessary parties.³

§ 539. So also it is a rule, that in all suits concerning real estate, which is vested in trustees by devise, if

¹ Story's Eq. Pl. § 142.

² 1 Dan. Ch. Pr. 301. A creditor of a deceased person, whether by judgment or simple contract, cannot, in general—there being an executor or administrator appointed—maintain a suit against a party in possession of, or claiming title to the assets of the debtor, to try the right to such assets. The executor or administrator is the person designated by the law, to vindicate all such rights; and it would be incongruous to allow the creditor to pass him by, and bring a suit directly against a party whom he conceives to be accountable to the executor. In equity, however, the creditor may make a debtor of the deceased, or other party against whom the executor has a claim, a party defendant, where the executor is insolvent, or is acting in collusion with the debtor, and in some other special cases. *Bate v. Graham*, 1 Kern. 239–40; *Hogan v. Walker*, 14 How. 29. “The rule, that an executor is the only proper person to sue a debtor to the testator’s estate, is liable to some exceptions: one is, that if the executor decline or refuse to call the debtor to an account, then any residuary legatee may file a bill for the purpose; another is, that if such a relationship exist between the debtor and the executor, as to render an account difficult to be taken in the usual form, then a like bill may also be filed.” *Saunders v. Druce*, 25 Law Times R. 123.

³ 1 Dan. Ch. Pr. 302.

such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate; such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases, it is not necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons to be made parties.¹

§ 540. In suits to execute the trusts of a will, it is likewise unnecessary to make the heir at law a party; but the plaintiff is, nevertheless, at liberty to make the heirs at law parties to the suit, where he desires to have the will established against them.² These general observations in regard to the nature and character of the interests of persons which entitle them to be deemed proper parties to a suit in equity, may suffice to convey an idea of the rules by which this important branch of equity pleading is governed. For a review of the principal classes of cases, to which they have been applied, the learned reader is referred to Mr. Justice Story's elaborate work on equity pleading, in which the subject is most lucidly and systematically treated.³

§ 541. If the want of proper parties appear on the face of the bill, it constitutes a good cause of demurrer.⁴ If the defect be not apparent on the bill, it may be taken advantage of by plea, or answer; and, in many cases,

¹ Equity Rules, xlvii. p. 128.

² Ibid. xlviii. p. 129.

³ See Story's Eq. Pl. § 153 et seq.

⁴ Ibid. § 541.

may also be insisted on at the hearing; and if the court shall proceed to a decree, it may be reversed on appeal, for defect of parties.¹ But when the parties, who are omitted, are mere formal parties, if the objection be not taken by demurrer, or by plea, the court will be indisposed to listen to the objection at the hearing; and if it can properly do so, will dispose of the cause upon the merits, without requiring such formal parties to be added.² The mere non-joinder of a person, who might be a proper party, but whose absence produces no prejudice to the rights of the parties before the court, will constitute no fatal objection at the hearing, or rehearing, or upon a bill of review.³

§ 542. If the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff is at liberty, within fourteen days after answer filed, to set down the cause for argument, upon that objection only; and the purpose for which the same is so set down must be notified by an entry to be made in the equity docket, in the form, or to the effect following, that is to say:—"Set down upon the defendant's objection for want of parties." And where the plaintiff shall not set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he will not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled, as of course, to an order for liberty to amend his bill by adding parties; but the court, if it think fit, may dismiss the bill.⁴

¹ Story's Eq. Pl. § 242; *Mathews v. Stephenson*, 6 Barr, 499.

² Story's Eq. Pl. § 542.

³ *Ibid.* § 74 a.

⁴ Equity Rules, l. p. 129. If an objection of want of parties be made at the hearing, the usual practice is, not to dismiss the bill, but to allow it to stand over, with liberty to amend, or file a supplemental bill, on payment of the costs of the hearing. *Mathews v. Stephenson*, 6 Barr, 499.

§ 543. And if a defendant, at the hearing of a cause, object that the suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court, in its discretion, may make a decree, saving the rights of the absent parties.¹ It is, however, the ordinary and common practice of a court of chancery, to continue to add, on motion, parties to a proceeding in that court, until every person interested, or that may be in any way affected by the decree, be brought upon the record. Indeed, as we have seen, a court of equity will, in general, refuse to proceed to a final disposition of the cause, until all persons interested are made parties to the bill.²

§ 544. The rule in respect to mere nominal parties is, that where no account, payment, conveyance, or other direct relief, is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially require him so to do by the prayer of his bill; but he may appear and answer, at his option; and if he do not appear and answer, he will be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he will be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.³

¹ Equity Rules, li. p. 130.

² *Seitz v. Buffum*, 2 Harris, 70.

³ Equity Rules, lii. p. 130.

CHAPTER II.

BILLS IN EQUITY.

§ 545. THE first step to be taken by a party who proposes to institute a suit in equity, is the proper preparation of his bill. This is done by his solicitor in the cause.¹ And every bill must contain the signature of counsel annexed to it, which is considered as an affirmation on his part, that upon the instructions given to him, and the case laid before him, there is good ground for the suit, in the manner in which it is framed.² The several kinds of bills have been usually considered as capable of being arranged under three general heads: 1. Original bills, which relate to some matter not before litigated in the court by the same persons standing in the same interests: 2. Bills not original, which are either an addition to, or a continuance of, an original bill, or both: 3. Bills, which though occasioned by or seeking the benefit of a former bill, or of a decision made upon it, or attempting to obtain a reversal of a decision made upon it, are not considered as a continuance of the former bill, but in the nature of original bills.³

¹ When a solicitor files a bill, the *onus* lies upon him to show that he had the plaintiff's authority for so doing; and if he fail to show such authority, or a subsequent acquiescence on the part of the plaintiff, the plaintiff is entitled to have his name removed from the record, with costs to be paid by the solicitor. *Maries v. Maries*, 23 Eng. L. & Eq. 221.

² Equity Rules, xxiii. p. 120.

³ Mitf. Eq. Pl. 33.

§ 546. And besides the different divisions of bills here enumerated, original bills are usually divided into those praying relief; and those not praying relief. Original bills praying relief are again subdivided into three heads: 1. Original bills, praying the decree of the court touching some right claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited: 2. Bills of interpleader: 3. Certiorari bills, which, however, are unknown in our practice. Original bills not praying relief, are of two kinds: 1. Bills of discovery: 2. Bills to perpetuate testimony.¹

§ 547. As original bills of the first kind are those most usually exhibited, the reader's attention will, in the present chapter, be principally directed to them; the other descriptions of bills, may be more properly considered in connexion with the practice of the court applicable to the particular suits of which they are the foundation. Bills which are not original, or which are merely in the nature of original bills, will also be separately considered.

§ 548. Where a bill prays the decree of the court touching rights claimed by the person exhibiting it, in opposition to rights claimed by the person against whom it is exhibited, it must contain a statement showing with reasonable certainty, the rights of the plaintiff or person exhibiting the bill; by whom and in what manner he is injured, or in what he wants the assistance of the court; and a prayer for relief suitable to his case; and for that purpose, that the process of the court may issue, to bring before it the parties complained of;² the facts should be

¹ 1 Dan. Ch. Pr. 351-2.

² Ibid. 359-60.

stated with sufficient precision to enable the court to make a specific decree, and not in such general terms as to enable the court merely to decide an abstract principle.¹ Thus, where a bill sets forth such leading facts as do not, when analyzed, show a case of fraud or mistake, allegations or averments in the bill that there was fraud or mistake, and the expressions "fraudulently," "deceitfully," "by mistake," &c., interspersed through it, will not bring the case within equitable jurisdiction, even on a demurrer to the bill.²

§ 549. The same precision in showing an interest, which is required in setting out the case of a plaintiff, is not requisite in stating that of the defendant against whom the relief is sought, because a plaintiff cannot always be supposed to be cognizant of the nature of a defendant's interests, and the bill must frequently proceed with a view to obtain a discovery of it. In all cases, however, a bill must show that the defendant is in some way liable to the plaintiff's demand, or that he has some interest in the subject of the suit, otherwise it will be liable to demurrer; and it must also show that there is such a privity between him and the plaintiff as gives the plaintiff a right to sue him.³

§ 550. A bill must also pray the court to grant the proper relief suited to the case; and if, for any reason founded on the substance of the case as stated in the bill, the plaintiff be not entitled to the relief he prays, either in the whole or in part, the defendant may demur. The prayer of the bill must ask the special relief, to which the plaintiff supposes himself entitled, and must also contain

¹ Delaware and Hudson Canal Co. v. Pennsylvania Coal Co., 9 Harris, 146; Collom v. Francis, 1 Pars. 531-2.

² Magniac v. Thomson, 2 Wall. Jr. 209.

³ 1 Dan. Ch. Pr. 372-3; Mitf. Eq. Pl. 189.

a prayer for general relief; and if an injunction, or a writ of *ne exeat*, or any other special order pending the suit, be required, it must also be specially asked for.¹ The rule on the subject is, that although, where the prayer does not extend to embrace all the relief to which the plaintiff may, at the hearing, show a right, the deficient relief may be supplied under the general prayer; yet such relief must be consistent with that specifically prayed, as well as with the case made by the bill; for the court will not suffer a defendant to be taken by surprise, and permit a plaintiff to pass over the prayer he has made and take another decree, even though it be according to the case made out by his bill.² The relief to be granted under the general prayer, must not only be consistent with the specific relief demanded, but must be sustained by the case made by the bill; and the allegations relied upon, must not only be such as to afford a ground for the relief sought, but they must appear to have been introduced into the bill for that purpose, and not for the purpose of corroborating the plaintiff's right to the special relief prayed.³

§ 551. Care must also be taken in framing the bill, that every thing which is intended to be proved be stated upon the face of it, otherwise evidence cannot be admit-

¹ Equity Rules, xx. p. 119.

² *Thomas v. Ellmaker*, 1 Pars. 114-5. If the plaintiff should mistake the relief to which he is entitled, in his special prayer, the court may yet afford him the relief to which he has a right, under the prayer of general relief, provided it be such relief as is agreeable to the case made by the bill; but if there be no prayer of general relief, then, if the plaintiff should mistake the prayer to which he is entitled, no other relief can be granted him, and his suit must fail, at least, unless an amendment of the prayer be allowed. *Gray v. Sutton*, Dist. Court, Philadelphia, 31 March 1855. MS.

³ *Delaware and Hudson Canal Co. v. Pennsylvania Coal Co.*, 9 Harris. 146. And see *Pollock v. National Bank*, 3 Seld. 281.

ted to prove it. This is required, in order that the defendant may be advised of the nature of the case to be made against him.¹ No facts are properly in issue, unless charged in the bill; and, of course, no proof can be generally offered of facts not in the bill; nor can any relief be granted for matters not charged, although they may be apparent from other parts of the pleadings, and evidence; for the court pronounces its decree *secundum allegata et probata*.² But the plaintiff need not, and indeed should not, state in the bill any matters of which the court is bound judicially to take notice, or is supposed to possess full knowledge.³

§ 552. The plaintiff must, however, in framing his bill, be careful that it do not contain statements or charges which are scandalous or impertinent, for, if it do, it may be objected to by the defendant.⁴ The rule on this subject is, that every bill must be expressed in as brief and succinct terms as it reasonably can be, and must contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it do, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter will be expunged at the expense of the plaintiff, and he must pay to the defendant all his costs in the suit up to that time, unless the court, or a judge thereof, shall otherwise direct. But if the master report that the bill is not scandalous or impertinent, the plaintiff will be entitled to all the costs occasioned by the reference.⁵

¹ 1 Dan. Ch. Pr. 377.

² Story's Eq. Pl. § 257; *Kelsey v. Western*, 2 Comst. 506.

³ See 1 Greenl. Ev. § 4-6.

⁴ 1 Dan. Ch. Pr. 397.

⁵ Equity Rules, xxiv. p. 120.

§ 553. Impertinence is the introduction of any matters into a bill, answer, or other pleading, or proceeding, which are not properly before the court for decision, at any particular stage of the suit.¹ Scandal consists in the allegation of any matter which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause; to which may be added, that any unnecessary allegation bearing cruelly upon the moral character of an individual is scandalous. There are many cases, however, in which, though the words on the record are very scandalous, and highly reflecting upon the party, yet, if they be material to the matter in dispute, and tend to a discovery of the point in question, they will not be considered scandalous.²

§ 554. No order can be made by a judge for referring any bill, answer, or pleading, or other matter, or proceeding depending before the court, for scandal or impertinence, unless exceptions be taken in writing, and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions be filed on or before the next rule day after the process on the bill is returnable, or after the answer, or pleading, is filed. And such order, when obtained, will be considered as abandoned, unless the party obtaining it shall, without any unnecessary delay, procure the master to examine and report for the same, on or before the next succeeding rule day; or the master shall certify that further time is necessary for him to complete the examination.³

§ 555. Another vice to be avoided in framing a bill in

¹ Story's Eq. Pl. § 266.

² 1 Dan. Ch. Pr. 397-8.

³ Equity Rules, xxv. p. 121.

equity, is what is termed multifariousness. The court will not permit a plaintiff to demand, by one bill, several matters of different natures against several defendants; for this would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the state of the several claims of the other defendants, with whom he has no connexion.¹ Neither can a plaintiff join in one bill several distinct and independent demands against one defendant.² But to support such an objection, the different grounds of suit must be wholly distinct, and each ground must be sufficient, as stated, to sustain a bill; if the grounds be not entirely distinct and unconnected, if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end, the objection does not apply.³

§ 556. Let us now proceed to consider the form of a bill in equity. This, according to the analysis of Lord Redesdale,⁴ consists of nine parts, some of which however are not essential, and may be used or not at the discretion of the person who prepares it. The first part is the direction or address of the bill to the court from which it seeks relief. In Pennsylvania, the address is, "To the Honourable the Justices of the Supreme Court of Pennsylvania, sitting in Equity;" or, "To the Honourable the Judges of the Court of Common Pleas of — County, sitting in Equity;" or otherwise, as the case may be.

§ 557. The second part is the introduction, which contains the names of all the parties, plaintiffs and defendants, by and against whom the bill is brought.⁵ And

¹ Mitf. Eq. Pl. 181; *United States v. Alexander*, 4 Cr. C. C. 311.

² Story's Eq. Pl. § 271; *Brady v. M'Cosker*, 1 Comst. 221.

³ Story's Eq. Pl. § 271 a; *Cahoon v. Bank of Utica*, 3 Seld. 486.

⁴ Mitf. Eq. Pl. 43.

⁵ Equity Rules, xix. p. 118.

it is not only necessary that the names of the several complainants in a bill should be correctly stated, but the description and place of abode of each plaintiff must be set out, in order that the court and the defendants may know where to resort, to compel obedience to any order or process of the court, and particularly for the payment of any costs which may be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit.¹ A demurrer will lie to a bill which does not state the plaintiff's place of abode; and if the bill describe the plaintiff as residing at a wrong place, the fact may be taken advantage of by plea.² The following is the form of the introductory part of a bill:—"A. B. of the city of Philadelphia, merchant, and C. D. of Pittsburgh, in the county of Allegheny, gentleman, bring this their bill against E. F. of the said city of Philadelphia, and thereupon your orators complain and say."

§ 558. The third part of a bill contains a narrative or statement of the plaintiff's case. Every averment necessary to entitle the plaintiff to the relief prayed for must be contained in the stating part of the bill. And every material fact to which the plaintiff means to offer evidence, ought here to be distinctly stated, otherwise he will not be permitted to offer or require any evidence of that fact. A general statement of charge of the matter of fact, is however sufficient; for it is not necessary to state minutely all the circumstances which may conduce to prove the general charge, which are properly matters of evidence.³

§ 559. Although the rules of pleading in courts of equity, especially in the case of bills, are not so strict as

¹ 1 Dan. Ch. Pr. 408-9; Ex parte Heritage, 23 Eng. L. & Eq. 352.

² Smith v. Smith, 23 Eng. L. & Eq. 266.

³ Welford's Eq. Pl. 101.

those adopted in courts of law, yet in framing pleadings in equity, the draftsman will do well to adhere as closely as he can to the general rules laid down in the books which treat of common law pleadings, whenever such rules are applicable to the case which he is called upon to present to the court; "for there can be no doubt that the stated forms of description and allegation which are adopted in pleadings at law, have all been duly debated under every possible consideration, and settled upon solemn deliberation; and that having been established by long usage, experience has shown them to be preferable to all others, for conveying distinct and clear notions of the subject to be submitted to the court:" and if this be so at law, there appears to be no reason why they should not be considered as equally applicable to pleadings in courts of equity, in cases where the object of the pleader is, to convey the same meaning as that affixed to the same terms in the ordinary courts.¹

§ 560. The fourth part states the general charge of confederacy against the defendant and persons unknown, whom it prays, when discovered, may be made parties defendant. This charge, although generally introduced in a bill, is wholly unnecessary, and may be treated as mere surplusage. Indeed, it is provided by rule of court, that "the plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure and defraud the plaintiff."² It would seem, therefore, to be not only unnecessary but improper to insert such a charge; for it is mere impertinence.

¹ 1 Dan. Ch. Pr. 412-13; *Bank of U. S. v. Biddle*, 2 Pars. 60. See ante, § 496, for the contents of a bill of discovery in aid of an execution at law.

² Equity Rules, xx. p. 118.

§ 561. The fifth part is what is termed the charging part of the bill; by which the plaintiff anticipates what is supposed will be the defence insisted on by the defendant, and then charges other matters which disprove or avoid it. This part of the bill may also be omitted by the plaintiff, at his option, and in our practice the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averment, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief.¹

§ 562. In many cases, however, the introduction of the charging part, is highly beneficial, not only for the purpose of introducing matter which would formerly have been the subject of a special replication, but as a foundation for interrogatories which may lead to a discovery of the defendant's case, and likewise afford grounds for collateral inquiries and directions in the decree which may not necessarily arise out of the case as mainly insisted upon in the bill, but which, in the event of partial success, either on the part of the plaintiff or defendant, may become necessary; but which, without some allegation or charge to warrant them in the pleadings, could not be introduced.² If the plaintiff wish to obtain a discovery of facts to anticipate and rebut the defence which may be set up by the defendant, he should, in the charging part of the bill, state the anticipated defence as a pretence of the defendant, and then charge the real facts, to lay a foundation for the discovery which is sought.³ It is in the discretion of the person who prepares the bill, to allege any pretence of the defen-

¹ Equity Rules, xx. p. 118.

² 1 Dan. Ch. Pr. 429.

³ *Stafford v. Brown*, 4 Paige, 88.

dants in opposition to the plaintiff's claim; but it must be founded upon an equitable case, fully averred in the stating part of the bill.¹

§ 563. The sixth part of the bill is termed the jurisdiction clause, and is intended to give jurisdiction over the suit to the court, by a general averment, that the acts complained of are contrary to equity, and tend to the injury of the plaintiffs; and that they have no remedy, or not a complete remedy, without the assistance of a court of equity. It is to be observed, however, that this averment alone will not give the court jurisdiction, unless a case be shown in the bill, from which it is apparent that the jurisdiction properly belongs to it. The omission of this clause, therefore, will not render the bill defective.²

§ 564. The bill, in the seventh place, prays that the parties against whom the complaint is made may answer all the matters contained in it, according to their knowledge, remembrance, information, and belief. This is called the interrogating part. It is a repetition, by way of interrogatory, of the matters most essential to be answered, adding to the inquiry after each fact, an inquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion, and compel a full answer. The interrogating part must therefore be formed on the prior stating part of the bill. If there be nothing in the prior allegations to warrant an interrogatory, it may be disregarded by the defendant as irrelevant.³ If an amended bill state, by way of pretence, a quotation

¹ Welford's Eq. Pl. 103.

² 1 Dan. Ch. Pr. 430; Equity Rules, xx. p. 118-19.

³ Welford's Eq. Pl. 104.

from the answer, and then negative it, and make inquiries respecting it, it is not impertinent.¹

§ 565. Interrogatories are not indispensable to a bill in equity;² and where no discovery is required from the defendant, as in a bill to perpetuate the testimony of witnesses, it is usual to omit them.³ But when they are inserted, and are founded on any matter contained in the stating part of the bill, the defendant is compelled to answer.⁴ A defendant, however, is not bound to answer any interrogatories, except those which such defendant is specially required to answer.⁵ They are to be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories, which each defendant is required to answer, must be specified in a note at the foot of the bill, in the form or to the effect following: "The defendant, A. B., is required to answer the interrogatories numbered respectively, 1, 2, 3, &c."⁶ This note is considered and treated as part of the bill; and the addition of any such note to the bill, or any alteration in, or addition to such note, after the bill is filed, is considered and treated as an amendment to it.⁷

§ 566. It is not, however, necessary to number every question in any case; and as the only object of the rule is to limit a defendant's answer to that portion of the interrogatories which applies to him, it does not seem, in a case where there is only one defendant, to be absolutely necessary to prefix any number.⁸ The following is the form of the interrogating clause, as prescribed by rule of court:—"To the end, therefore, that the said defendants

¹ Welford's Eq. Pl. 105.

² Eq. Draftsman, 363 n.

³ Equity Rules, xxxviii. p. 125.

⁴ Ibid. xl. p. 126.

⁵ Eberly v. Groff, 9 Harris, 256.

⁶ Eberly v. Groff, 9 Harris, 256.

⁷ Ibid. xxxix. p. 125.

⁸ 1 Dan. Ch. Pr. 431.

may, if they can, show why your orator should not have the relief hereby prayed; and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief; full, true, direct, and perfect answer make to such of the several interrogatories, hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer, that is to say: 1. Whether, &c.: 2. Whether, &c.”¹

§ 567. The eighth part is the prayer for relief, which is craved according to the circumstances of the case. It is generally divided into two parts, viz., the prayer for specific relief, and the prayer for general relief. “The latter can never be properly and safely omitted; because, if the plaintiff should mistake the relief to which he is entitled in his special prayer, the court may yet afford him the relief to which he has a right, under the prayer of general relief, provided it be such relief as is agreeable to the case made by the bill.”² Indeed the rule of court requires that the bill should not only ask the special relief to which the plaintiff supposes himself entitled, but also contain a prayer for general relief; and that if an injunction, or writ of *ne exeat*, or any other special order pending the suit be required, it should be specially asked for.³

§ 568. Although the court will not, under the general prayer, grant a different relief from that prayed by the bill, yet when it appears that the plaintiff is entitled to relief, although it be different from that which he has specifically prayed, it will sometimes allow the cause to

¹ Equity Rules, xli. p. 126.

² Story's Eq. Pl. § 40; 1 Dan. Ch. Pr. 434.

³ Equity Rules, xx. p. 119. See *Brinker v. Brinker*, 7 Barr, 56.

stand over, with liberty to the plaintiff to amend his bill. The instances, however, in which this will be done, are confined to those where it appears, from the case made by the bill, that the plaintiff is entitled to relief, although different from that sought by the specific prayer: where the object of the proposed amendment is to make a new case, it will not be permitted. Where a party has mistaken his case, and brings the cause to a hearing under such mistake, the ordinary practice is, to dismiss the bill, without prejudice to a new bill.¹

§ 569. It sometimes happens that the plaintiff, or those who advise him, are not certain of his title to the specific relief he wishes to pray for; it is, therefore, not unusual so to frame the prayer that if one species of relief sought be denied, another may be granted. Bills, with a prayer of this description, framed in the alternative, are called bills with a double aspect. A proper case for a bill with a double aspect is, where the complainant is in doubt whether he be entitled to one kind of relief or another, upon the facts of his case as stated in his bill. He may then frame his bill in the alternative; so that if the court decide that one kind of relief is not proper, he may still be entitled to obtain any other relief, to which he is entitled under the other part of the alternative prayer; but his prayer concluding for general relief should, in such case, be in the disjunctive. So, where the complainant is entitled to some kind of relief, on the general facts stated in his bill, if the nature of the relief he is entitled to, depend upon the existence or non-existence of a particular fact or circumstance, which is not within his knowledge, he may allege his ignorance of such fact, and call for a discovery

¹ 1 Dan. Ch. Pr. 439-40.

thereof; and, in such case, he may also frame his prayer in the alternative, so as to obtain the proper relief, according as the fact may appear at the hearing of the cause.¹

§ 570. The ninth part of the bill consists of the prayer for process. The prayer for process of subpoena, must contain the names of all the defendants named in the introductory part of the bill; and if any of them are known to be infants, under age, or otherwise under guardianship, must state the fact, so that the court may take order thereon, as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat*, or any other special order pending the suit, be asked for in the prayer for relief, that will be sufficient without repeating the same in the prayer for process.² The following is the usual form of the prayer for process:—"May it please your honours to grant unto your orator, the commonwealth's writ of subpoena to be directed to the said A. B. and C. D. the defendants, thereby commanding them, and every of them, at a certain day, and under a certain pain, to be therein limited, personally to be and appear before your honourable court, and then and there, full, true, direct and perfect answer make to all and singular the premises; and further, to stand to, perform, and abide, such further order, direction, and decree therein, as to your honours shall seem meet: and your orator shall ever pray, &c." No person is a party defendant, although named in the bill, against whom process is not prayed.³ In bills for discovery merely the latter clause in the prayer must be omitted.

§ 571. We have seen, that every bill must contain the

¹ Lloyd v. Brewster, 4 Paige, 537.

² Equity Rules, xxii. p. 119-20.

³ Welford's Eq. Pl. 108.

signature of counsel annexed to it, which is considered as an affirmation, on his part, that upon the instructions given to him, and the case laid before him, there is good ground for the suit, in the manner in which it is framed.¹ And in bills for an account, the counsel must also annex a certificate, that in his opinion the case is of such a nature that no adequate remedy can be obtained at law, or that the remedy at law will be attended with great additional trouble, inconvenience, and delay.² The acts of assembly, however, conferring on the courts chancery jurisdiction in certain cases, do not, it must be remembered, oust the jurisdiction of the common law courts, exercising equity powers under the common law forms; they are concurrent remedies, and the plaintiff may elect either.³

§ 572. There are certain cases in which it is necessary that the bill should be accompanied by an affidavit, to be filed with it, and in which the omission of such accompaniment will render the bill liable to demurrer. Thus, when a bill is filed to obtain the benefit of an instrument, upon which an action at law would lie, upon the ground that it is lost, and that the defendant cannot therefore have any relief at law, the court requires that the bill should be accompanied by an affidavit of the loss of the instrument. So, in suits for the discovery of deeds and writings, and for relief founded upon such instruments; if the relief prayed be such as might be obtained at law, on the production of the deeds or writings, the plaintiff must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant; but a bill for discovery merely,⁴ or which only

¹ Equity Rules, xxiii. p. 120.

² Purd. Dig. 306.

³ *Biddle v. Moore*, 3 Barr, 176; *Aycinena v. Peries*, 6 W. & S. 256.

⁴ A bill of discovery, (except in aid of an execution, by statute,) never re-

prays the delivery of deeds or writings, or equitable relief grounded on them, does not require such an affidavit.¹ So also a bill of discovery in aid of an execution at law must be accompanied by an affidavit of the plaintiff, his agent or attorney, or of some disinterested person on his behalf, that he verily believes the facts set forth therein to be true.² In bills of interpleader, also, an affidavit is always required of the plaintiff, that he does not collude with either of the defendants; and if the bill be filed by an officer of a company on behalf of the company, he must annex a like affidavit, and add, that, to the best of his knowledge and belief, the company do not collude with the defendants.³ And if there be any money due, he must bring it into court, or at least offer to do so by his bill.⁴ The omission of the requisite affidavit, however, can only be taken advantage of by demurrer.⁵

quires an affidavit; for although during the pendency of a bill of discovery unanswered, it is the practice to continue the cause, the defendant himself can, at any moment, remove the impediment by filing his answer. *M'Canles v. Coolbaugh*, 1 T. & H. Pr. 83-4.

¹ 1 Dan. Ch. Pr. 449.

² *Purd. Dig.* 310.

³ *Story's Eq. Pl.* § 297; *Eden on Injunctions*, 401.

⁴ *Story's Eq. Pl.* § 291.

⁵ 1 Dan. Ch. Pr. 452-3.

CHAPTER III.

PROCESS AND APPEARANCE.

§ 573. AFTER the bill has been prepared and signed by counsel, it is in the next place requisite that it should be filed; for no process of subpoena can issue from the prothonotary's office in any suit in equity, until the bill be actually filed.¹ The equity side of the courts is deemed to be always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of causes upon their merits.² The prothonotary, on receiving a bill, dates it the day it is brought into the office, numbers it, and, upon a præcipe left with him by the plaintiff's solicitor, and which is usually endorsed on the bill, issues a subpoena against the defendant, and thereupon enters the suit upon his docket as pending in the court: he also states upon the docket the time of the entry, and upon the return of the process, he enters the return.³ Upon this docket are also entered all motions, rules, orders, and other proceedings, made and directed at chambers, or, on rule days, at the prothonotary's office, whether special or of course; and it is open, at all office hours, to the free inspection of the parties and their solicitors.⁴

¹ Equity Rules, xi. p. 115.

³ Ibid. xv. p. 116.

² Ibid. i. p. 111.

⁴ Ibid. iv. p. 112.

§ 574. The process of subpoena constitutes the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill. The following is the form of the subpoena in use in the county of Philadelphia:

“State of Pennsylvania, City and County of Philadelphia, ss: The Commonwealth of Pennsylvania; to A. B. and C. D., greeting: We command you that you personally be and appear before the judges of our court of common pleas for the city and county of Philadelphia, at a court to be holden at Philadelphia, in and for the said city and county, on the first Monday of ——— next, to answer to a bill of complaint exhibited against you in our said court by E. F., and to do further and to receive what our said court shall have considered in this behalf. And this you are not to omit under the penalty of four hundred dollars. Witness the honourable Oswald Thompson, president of our said court, at Philadelphia, the —— day of —— in the year of our Lord one thousand eight hundred, &c.”

§ 575. At the bottom of the subpoena must be placed a memorandum, that the defendant is to enter his appearance in the suit in the prothonotary's office, on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.¹ The following is the form adopted: “Memorandum.—The defendants are to enter their appearance in the suit, in the prothonotary's office, on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.”

§ 576. Whenever a bill is filed, the prothonotary issues the process of subpoena thereon, as of course, upon the application of the plaintiff; which must be made returnable into the prothonotary's office the next rule day, or the next

¹ Equity Rules, xii. p. 115.

rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing.¹ The first Monday of every month is a rule day.² When there are more defendants than one, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.³

§ 577. The service of all subpoenas is to be in the same manner as writs of summons are directed by law to be made. In cases where husband and wife are defendants, service on the husband is deemed sufficient service upon both.⁴ It is not necessary that the subpoena be served by the sheriff; the service may be made by the complainant or his agent;⁵ but in such case, the person serving the process must make affidavit thereof.⁶ The act of assembly prescribing the manner of serving a summons, authorizes either of two modes of personal service: the one, "by reading the writ in the hearing of the defendant;" and the other, "by giving the defendant notice of the contents of the writ, and by giving him a true and attested copy thereof." It also authorizes, if the defendant cannot conveniently be found, either of two modes of executing the writ by leaving a copy: the one, "by leaving a true and attested copy at the defendant's dwelling-house, in the presence of one of the adult members of his family;" and the other, if the defendant reside in the family of another, "by leaving a true and attested copy at the house in which the defendant resides, with one of the adult members of the family in which he resides."⁷

¹ Equity Rules, xii. p. 115.

² Ibid. ii. p. 111.

³ Ibid. xii. p. 115.

⁴ Ibid. xiii. p. 116.

⁵ *Megarge v. Batc*, 1 T. & H. Pr. 82.

⁶ Rules of the Supreme Court of the United States, xv. p. 157.

⁷ *Purd. Dig.* 23; *Weaver v. Springer*, 2 Miles, 43. And see *Wilson v. Hayes*, 6 Harris, 354.

§ 578. A return of service on the defendant, "by leaving a copy at his boarding-house, in the presence of one of the adult members of the family, and by leaving a copy at the store of the defendant in the presence of his clerk, and by leaving a copy at the dwelling-house of the defendant's father, in the presence of adult members of the family;" was held sufficient, although it appeared that the defendant, a few days before the service of the writ, had left the country, and gone on a temporary visit to Europe.¹ When service is effected by copy, it must appear that the copy was "attested," by the person serving it.²

§ 579. In case of a corporation defendant, service may be made upon the president or other principal officer, or on the cashier, treasurer, secretary, or chief clerk of such corporation; or, if the defendant be an incorporated railroad or canal company, whose property is situated, in whole or in part, in the county in which the suit is brought, and the president, secretary, or chief clerk, cannot be found in such county, service may be made upon any manager or director of such company, being within the county; and in case no director or manager can be there found, the person charged with the service of the writ, may go into an adjoining county to effect a service. Where any corporation has an agency, or transacts business, in any county, service may be made upon the president, cashier, agent, chief or any other clerk, or upon any director or agent of such corporation within the county. And where any corporation, incorporated by this commonwealth, shall have their principal office for the transaction of business located out of the state, or where the president, treasurer, cashier, or other principal officer of such company shall reside without the state, such

¹ *Farnum v. Walton*, 1 T. & H. Pr. 233. And see *Bujac v. Morgan*, 3 Yeates, 258.

² *Bank v. Perdriaux*, Bright. R. 67.

company may be sued in any county where their works shall be located, or adjoining thereto, or where any director, manager, or other officer shall reside, and service of process may be made upon any such director, manager, or other officer. In case of a foreign corporation, process may be served upon any officer, agent, or engineer of such corporation, either personally, or by copy, or by leaving a certified copy at the office, depot, or usual place of business of such corporation.¹

§ 580. Independently of any statute, a court of equity has no power to order service of its process to be effected out of the jurisdiction. The courts of common pleas and district courts cannot issue process into another county: but the original jurisdiction of the supreme court extends throughout the state, and their process runs into every county in the commonwealth.² Its equity jurisdiction in the city of Philadelphia is exercised by one of the judges in the court of nisi prius, subject to an appeal to the court in banc.³

§ 581. Whenever a subpoena is returned not executed as to any defendant, the plaintiff is entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service be made.⁴ If service cannot be effected on the defendant, the court has no power to order that service of the subpoena in equity on his attorney at law, shall be a good service, except in injunction cases, to stay proceedings at law, and in cross-suits; where the plaintiff at law in the first, and the plaintiff in equity in the second case, resides beyond the jurisdiction of the court.⁵ The practice of the court, directing service of the subpoena on the attorney of the

¹ Purd. Dig. 168-9.

² Ibid. 307-8.

³ Ibid. 308.

⁴ Equity Rules, xiv. p. 116.

⁵ Eckert v. Bauert, 4 W. C. C. 370; Ward v. Sebring, Ibid. 426, 472. See act

plaintiff at law in cases of injunctions, and on the solicitor of the plaintiff in the original suit where a cross-bill is filed, is founded on the necessity of the case; there being no remedy for the party unless it be afforded by entertaining these suits, and countenancing a service of the subpoena on the law agent of the non-resident party. But in all cases of original bills, relief may be obtained in the courts of the defendant's domicil, and consequently, there is no necessity for applying to these cases the practice which is adopted in injunction and cross-bills.¹

§ 582. On a bill of discovery in aid of an execution at law, the act of 1836 provides, that instead of a subpoena, a writ of *scire facias* shall issue to the sheriff, requiring him to make known to the defendants therein named, that they be and appear, at a certain time to be appointed by the court, to answer the said bill, and all such interrogatories as shall be propounded to them, or show cause why they should not, and abide the judgment of the court in the premises. But no defendant shall be compelled to answer such bill or interrogatories, at the time appointed, unless a copy of the bill and interrogatories shall have been served upon him, at least ten days previously thereto.² The copy of the bill and interrogatories may be served in the same manner as a summons.³ And the defendant is bound to answer, although ten days did not intervene between the service and return of the *scire facias*; but not until ten days from the service of a copy of the bill and interrogatories.⁴

§ 583. The statute further provides, that from the time of the service of the *scire facias*, in such case, upon

27th March 1854, as to the service of process on non-resident executors, administrators, assignees, and other trustees; and on mortgagees and judgment creditors. Purd. Dig. 1101.

¹ Ward v. Sebring, 4 W. C. C. 474.

² Purd. Dig. 310.

³ Gouldey v. Gillespie, 4 Penn. L. J. 51

⁴ Large v. Bristol Transportation Co., 2 Ash. 394.

any person other than the defendant in the judgment, the personal property of the defendant in the hands of such person shall be bound thereby, and shall be liable to be taken in execution, at the instance of the plaintiff, in like manner as goods or effects in the hands of a garnishee in a foreign attachment; and that if such person shall transfer the same to any other person, after service of the writ, he shall be liable to pay the value thereof to the complainant, out of his own proper goods and chattels.¹ The purposes of this act are not confined to a mere discovery of the defendant's property; the proceedings on the *scire facias* are substantially the same as in foreign attachment; and therefore, where the defendant and garnishee have waived their privilege of trial by jury, by omitting to plead to the *scire facias*, and have submitted the case upon answers to the interrogatories, the court may render a joint judgment against them for the amount of the plaintiff's debt.² The service of the *scire facias* binds the person of the garnishee, but does not create a lien on the goods in preference to a subsequent execution.³

§ 584. A difference of practice exists, in reference to the process upon a bill of discovery in aid of the determination of an issue, pending in the common law side of the same court. The district court of Philadelphia has decided, that the proper practice on filing a bill of discovery is, in all cases, to issue upon it a subpoena;⁴ but Mr. Justice Lowrie, sitting in the district court of Allegheny, has determined that the party, in such case, should be called to answer by rule, and not by subpoena.⁵

§ 585. The appearance day of the defendant is the rule day to which the subpoena is made returnable; pro-

¹ Purd. Dig. 310.

² *Shaffer v. Watkins*, 7 W. & S. 219.

³ *Bennett's Appeal*, 10 Harris, 476.

⁴ *Tilden v. Franklin*, 1 T. & H. Pr. 79.

⁵ *Peebles v. Bangs*, Ibid. 79.

vided he have been served with the process twenty days before that day; otherwise, his appearance day is the rule day succeeding the rule day when the process is returnable. The appearance of the defendant, either personally or by his solicitor, must be entered in the margin of the equity docket, by writing his name opposite the name of the defendant for whom he appears.¹ If the defendant do not appear, after due service of process, the bill may be taken *pro confesso* against him.²

§ 586. If, however, the plaintiff do not choose to take the bill *pro confesso*, he is at liberty to proceed to compel an appearance by attachment.³ This must be directed to the sheriff, and is returnable immediately. According to the English practice, the writ must be endorsed, "For not appearing at the suit of A. B. complainant;"⁴ but by our practice, this is usually inserted in the body of the writ. The officer to whom it is directed and delivered ought, with all speed and secrecy, to execute the same according as it commands him, and he is bound to pursue the effect of his writ.⁵ And if the defendant be taken, he must either go to prison for safe custody, or put in bail to the sheriff; for the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered whether the sheriff detain his person or take sufficient security for his appearance.⁶ The sheriff, however, cannot take bail on an attachment for a contempt which is not of aailable nature; as for not answering, or not obeying the decree of the court.⁷

§ 587. When the sheriff has been ordered to take a defendant into custody for a contempt upon mesne pro-

¹ Equity Rules, xvi. p. 116.

² Ibid. xii. p. 115.

³ Ibid. vii. p. 113.

⁴ 1 Dan. Ch. Pr. 520.

⁵ Ibid. 524.

⁶ Ibid. 526.

⁷ Equity Rules, viii., xvii., p. 114, 117.

cess, and is unable to effect a service of the writ; the next process which issues, in our practice, to compel the obedience of the party, is a sequestration; which is a writ or commission, sometimes directed to the sheriff, or which is most usual, to certain persons appointed by the court, empowering him or them to enter upon and sequester the real and personal estate and effects of the defendant, (or some particular part or parcel of his lands) and to take, receive, and sequester the rents, issues, and profits thereof; and keep the same in their hands, or pay the same in such manner and to such persons as the court shall in its discretion appoint, until the parties shall have appeared to, or answered the plaintiff's bill; (or performed some other matter which has been ordered and enjoined by the court, in the process specifically mentioned,) and for not doing whereof he is in contempt.¹

§ 588. The sequestrators, under a sequestration on mesne process, may take possession of all the defendant's goods and chattels. But in general, a chose in action is not the subject of sequestration. They may also enter into possession of such parts of the defendant's real estate as are in his own occupation, or in the occupation of his tenants. So, where the defendant conveys to a stranger, pending the suit, such a possession will not be regarded; but where there is a possession under an adverse title, it will be protected in chancery upon an examination *pro interesse suo*. In this commonwealth, where the adverse possession is held in good faith, and has not been acquired pending the suit, no court would disturb it by any summary process. The right of trial by jury would stand in the way of such a proceeding. It is not reasonable to suppose that the legislature intended to involve

¹ Ibid. See form of sequestration in the orphans' court; Purd. Dig. 623.

sequestrators in the endless litigation which might flow from the sequestration of mere rights in action.¹

§ 589. It is obvious, from the nature of the process of contempt, that if a defendant abscond so as to avoid its operation; or if, when arrested under it, he perversely refuse to submit; and the process of sequestration becomes ineffectual to compel obedience, the plaintiff is without further remedy, except that of taking the bill *pro confesso*. The court will, therefore, in cases where the process has been ineffectually employed against the defendant, make an order that the facts of the bill shall be considered as true, and decree against the defendant according to the equity arising upon the case stated by the plaintiff's bill.² This may be done either upon a default of appearance, or of an answer; and thereupon, it is provided, that the cause shall be proceeded in, *ex parte*, and the case may be put upon the next argument list, and the matter of the bill may be decreed by the court, when there reached in its order, if the same can be done without an answer, and is proper to be decreed.³

§ 590. When a bill is taken *pro confesso*, and the court has proceeded to a decree, such decree, so rendered, will be deemed absolute, unless the court, within three months after the service of notice of such decree upon the defendant, set aside the same, and give the defendant time for filing his answer, upon cause shown; and no such motion will be granted, unless the defendant will undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall impose, for the purpose of speeding the cause.⁴

¹ Gordon v. Ingraham, Sup. Court, Pittsburgh Leg. J. 2 December 1854.

² 1 Dan. Ch. Pr. 569. ³ Eq. Rules, xvii. p. 117. ⁴ Ibid. xviii. p. 118.

CHAPTER IV.

OF THE DEFENCE.

§ 591. SUPPOSING the defendant to have appeared to the suit, we have now to consider the various defences which may be put in to the plaintiff's bill. The grounds of defence in equity may be divided into six classes, viz.: 1. Want of jurisdiction in the court: 2. Disability in the plaintiff to sue, or in the defendant to be sued: 3. A decision already made, or still pending, on the same matter, in the court itself, or in some other court of competent jurisdiction: 4. Want of equity, where no case is established on the merits; and this includes not only cases where there is no right in the plaintiff, but also those where his right, though in fact existing, is not alleged with sufficient certainty in his bill, or where it is a right at law and not in equity; and also cases where the affidavit required for transferring the jurisdiction into equity, has not been annexed to the bill: 5. Multifariousness, and unduly splitting up a cause of suit: 6. Want of parties.¹

§ 592. The forms of defence are four in number, viz.: disclaimer, demurrer, plea, and answer. A disclaimer denies that the defendant has any interest in the matter. A demurrer submits that on the plaintiff's own showing his claim is bad. A plea avers some matter of avoid-

¹ Adams' Equity, 331.

ance, or denies some one allegation in the bill, and rests the defence on that issue. An answer puts on the record the whole case of the defendant, whether by way of demurrer, of avoidance, or of denial, and whether raising one or more issues.¹

§ 593. A defendant, however, is not necessarily confined to one of these forms of defence, but may use two or more of them against the same bill, provided he apply them to different parts, and distinctly point out the application. Thus a defendant may demur to one part of the bill, plead to another, answer to another, and disclaim as to another. He may also put in separate and distinct demurrers to separate and distinct parts of the same bill; and he may also plead different matters to separate parts of the same bill.² Lord Redesdale lays it down, that “all these defences must clearly refer to separate and distinct parts of the bill; for a defendant cannot plead to that part to which he has already demurred, neither can he answer to any part to which he has either demurred or pleaded; the demurrer demanding the judgment of the court whether he shall make any answer, and the plea whether he shall make any other answer than what is contained in the plea; nor can the defendant, by answer, claim what, by disclaimer, he has declared he has no right to. A plea or answer will therefore overrule a demurrer, and an answer a plea; and if a disclaimer and answer be inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.”³

§ 594. The strictness of this doctrine has been in some respects modified by our rules of court, which di-

¹ *Ibid.* 332.

² 2 *Dan. Ch. Pr.* 923; *Equity Rules*, xxx. p. 122.

³ *Mitf. Eq. Pl.* 319.

rect that no demurrer or plea shall be held bad and overruled on argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to; or merely because the answer of the defendant may extend to some part of the same matter, as may be covered by such demurrer or plea.¹ In all cases not coming strictly within the terms of these rules, the principles above quoted from Lord Redesdale still apply, and in addition thereto, it is to be remarked, that it is a general rule, where a defendant adopts this mode of defence, not only that each defence should in words be applicable to the distinct part of the bill to which it professes to apply, but it should also, in substance, relate peculiarly to that part of the bill which it professes to cover; so that a defence, in words applicable to part of a bill only, but in reality applicable to the whole bill, is not good, and cannot stand in conjunction with another distinct defence applicable and applied to another distinct part of the bill.²

§ 595. The plaintiff is entitled, immediately after the defendant's appearance is entered, to a rule on the defendant, to be entered of course in the prothonotary's office, to file his demurrer, plea, or answer to the bill, on the rule day next succeeding that on which he entered his appearance; provided twenty days intervene between the service of notice of such rule and the rule day.³ The first Monday of every month is a rule day,⁴ and if a rule to answer, plead, or demur, be entered at any intervening period, it is considered as entered to the succeeding rule day.⁵ Notice of the rule may be given

¹ Equity Rules, xxxiv., xxxv., p. 124.

² 2 Dan. Ch. Pr. 924.

³ Equity Rules, xvii. p. 117.

⁴ Ibid. ii. p. 111.

⁵ This has been determined by the district court of Philadelphia.

to the solicitor of the defendant;¹ and in default of answer, at the time appointed, the plaintiff may, at his election, enter an order, as of course, in the equity docket, that the bill be taken *pro confesso*;² or the plaintiff, if he require any discovery or answer to enable him to obtain a proper decree, will be entitled to process of contempt against the defendant to compel an answer; and the defendant, if arrested upon such process, will not be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to, or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause. In the latter case, however, the rule must be served personally upon the defendant.³

§ 596. Before considering the other modes of defence to a bill in equity, we will briefly notice that by a disclaimer. That is, where a defendant, upon oath, denies that he has or claims any right to the thing in demand by the plaintiff's bill, and disclaims, *i. e.*, renounces all claim thereto. A disclaimer, however, cannot often be put in alone; for although if a plaintiff, from a mistake, make a person a party to a suit who is in no way interested in or liable to be sued, touching the matters in question, a simple disclaimer by such person might be good; yet, as it is possible that the defendant may have had an interest which he may have parted with, the plaintiff has a right to require an answer sufficient to ascertain whether that be the fact or not; and if a defendant have had an interest which he has parted with, an answer may also be necessary to enable the plaintiff

¹ Equity Rules, iv. p. 112.

² Ibid. xvii. p. 117. See ante, § 589-90.

³ Equity Rules, xvii. p. 117.

to make the proper person a party instead of the defendant.¹

§ 597. Though a disclaimer is, in substance, distinct from an answer, yet it is, in point of form, an answer, and is preceded by the same formal words; and it is put in and filed in the same way. It contains simply an assertion that the defendant disclaims all right and title to the matter in demand. Lord Redesdale observes, that in some instances, from the nature of the case, this may perhaps be sufficient, but that the forms given in the books of practice, are all of an answer and disclaimer.²

§ 598. If one be made a defendant in a bill, among other material defendants, who in nowise pretends to any right to the matter in question, and he thereupon disclaim, he may, after such disclaimer, upon motion for that purpose, be examined as a witness in the cause on behalf of the other defendants; for it shall be presumed his name was inserted in the bill, without other cause than to take away his testimony from the other defendants. If however the plaintiff wish the evidence of the party disclaiming, he must amend his bill by striking out his name as a defendant, or move to dismiss it as against such defendant.³

¹ 2 Dan. Ch. Pr. 807.

² Ibid. 808; Mitf. Eq. Pl. 319.

³ 2 Dan. Ch. Pr. 810.

CHAPTER V.

DEMURRERS.

§ 599. WHEREVER any ground of defence is apparent upon the bill itself, either from the matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of defence is by demurrer. It demands the judgment of the court, whether the defendant shall be compelled to answer the complainant's bill, or that particular part of it to which the demurrer applies.¹ A defendant may demur to the whole bill or to part of it, or he may demur to part, plead to part, and answer as to the residue.² But each of these modes of defence must, as a general rule, be actually applied to different and distinct parts of the bill, and must be consistent with each other.³ It is however provided, by rule of court, that no demurrer shall be overruled, merely because it does not cover so much of the bill as it might by law have extended to; or solely because the answer may extend to some part of the same matter, that may be covered by such demurrer.⁴

§ 600. The rules of pleading in courts of law, generally, are regarded in courts of equity; and no principle is better established, than if there be a general demurrer to a declaration, or to a plea, and any part be good, the de-

¹ 1 Dan. Ch. Pr. 598-9.

² Equity Rules, xxx. p. 122.

³ Story's Eq. Pl. § 442.

⁴ Equity Rules, xxxiv., xxxv., p. 124.

murrer must be overruled. So, in a court of equity, "if a demurrer be too general, that is, if it cover, or be applied to the whole bill, when it is good to a part only; or, if it be a demurrer to a part of a bill only; but yet is not good to the full extent which it covers, but is so to a part only, it will be overruled; for it is a general rule, that a demurrer cannot be good as to a part, which it covers, and bad as to the rest; and therefore it must stand or fall altogether."¹ Therefore, to avoid the hazard of one general demurrer to all parts of the bill, a defendant should put in a separate demurrer to distinct parts of the bill, for separate and distinct causes. If separate demurrers are put in to different and distinct parts of a bill, one demurrer may be overruled upon argument, and another allowed.²

§ 601. No demurrer will be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay.³ And if, upon the argument of the demurrer, the court shall deem it to have been for vexation or delay, and to have been frivolous or unfounded, the bill may be ordered to be taken against the defendant, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.⁴

§ 602. It is not compulsory on a defendant to demur. The principal motives for so doing are, to avoid a prejudicial discovery, and to prevent unnecessary expense. If these do not exist, it is generally an inexpedient and often an objectionable course, as involving a premature discussion of the case, of which the plaintiff will probably

¹ Story's Eq. Pl. § 443.

² Bank of United States v. Biddle, 2 Pars. 60-1.

³ Equity Rules, xxix. p. 122.

⁴ Ibid. xxxii. p. 123.

take advantage.¹ The former of these motives has, to a considerable extent, been removed by the rule of court which provides, that a defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.²

§ 603. A demurrer necessarily admits the truth of the facts stated in the bill, so far as they are relevant, and are well pleaded; but it does not admit the conclusions of law drawn therefrom, although they are also alleged in the bill.³ Thus, where a bill sets forth such leading facts as do not, when analyzed, show a case of fraud or mistake, allegations or averments in the bill that there was fraud or mistake, and the expressions "fraudulently," "deceitfully," "by mistake," &c., interspersed throughout it, will not bring the case within equitable jurisdiction, even on a demurrer.⁴

§ 604. It is a general principle applicable to pleadings in equity, that a defendant should, in assigning the causes of a demurrer, clearly point out the nature of the objection which he takes: no causes of demurrer not assigned will be regarded by the court.⁵ When no particular cause is assigned, except the usual formulary that there is no equity in the bill, it is termed a general demurrer, and this will be sufficient when the bill is defective in sub-

¹ Adams' Eq. 336.

² Equity Rules, xlii. p. 126.

³ Story's Eq. Pl. § 452.

⁴ *Maguiac v. Thomson*, 2 Wall. Jr. 209. Fraud is, of all others, a charge most requiring distinct averments; it is not to be raised by mere inference. *Kelly v. Rogers*, 25 Law Times R. 140.

⁵ *Bogardus v. Rosendale Manufacturing Co.*, 3 Seld. 149.

stance: defects of form must, however, be specially assigned as causes of demurrer.¹

§ 605. A demurrer can only be for objections apparent upon the face of the bill itself, either from the matter inserted or omitted therein, or from defects in the frame or form thereof. It cannot, therefore, state what does not appear upon the face of the bill, otherwise it would be, what has been emphatically called, a speaking demurrer; that is, a demurrer wherein a new fact is introduced to support it.² The same result, however, may be obtained under our practice, at least so far as a discovery is concerned, by an answer setting up the particular fact upon which the defendant relies to protect him from discovery, and declining to answer the particular interrogatories to which the matter thus set forth is applicable.³

§ 606. A defendant may also, at the hearing of his demurrer, orally assign another cause of demurrer, different or in addition to those assigned upon the record; which, if valid, will support the demurrer, although the causes stated in the demurrer itself, be held to be invalid. This oral statement of a cause of demurrer at the bar, is called demurring *ore tenus*. Such demurrer *ore tenus* must, however, be co-extensive with the demurrer upon the record.⁴ And in such case, if the defendant succeed in his demurrer, *ore tenus*, he gets no costs.⁵

§ 607. A demurrer may be either to the relief prayed, or it may be to the discovery only, or to both. We will first consider demurrers to the relief; for according to the English practice, if the demurrer be good to the re-

¹ Ibid.; Story's Eq. Pl. § 455.

² Story's Eq. Pl. § 448.

³ Perry v. Kinley, 3 Am. L. R. 183.

⁴ 1 Dan. Ch. Pr. 657-8.

⁵ Bogardus v. Rosendale Manufacturing Co., 3 Seld. 149.

lief, it will be so to the discovery; if therefore a plaintiff be entitled to the discovery alone, and go on to pray relief, a general demurrer to the whole bill will be allowed.¹ This is not, however, the practice in the American courts, where it is held, that if the plaintiff be entitled to a discovery, and not to relief, the defendant must answer the former, and may demur to the latter; but a general demurrer will be overruled, if the plaintiff be entitled to an answer to either the discovery or relief.² The grounds of demurrer to original bills for relief, may be divided into three classes, viz.: 1. To the jurisdiction: 2. To the person of the plaintiff: 3. To the matter of the bill, either as to its substance, or to its form or frame.³

§ 608. Demurrers to the jurisdiction may be further divided into three heads. First, that the subject is not cognizable by any municipal court of justice. There are some matters of a political nature which are so entirely fit for negotiation or treaty by the executive department of the government, that courts of justice cannot undertake to redress wrongs which have been committed in relation to them. A political treaty made between two independent nations, relating to national affairs, cannot be enforced in the courts of law or equity. But a distinction must be made between a treaty of this nature and one which provides for the assertion of private rights, or for objects which may properly be redressed in courts of justice, and which have no connexion with, nor involve the rights of sovereignty.⁴

§ 609. The second cause of demurrer to the jurisdic-

¹ 1 Dan. Ch. Pr. 603.

² *Baker v. Biddle*, 1 Bald. 409; *Brownell v. Curtis*, 10 Paige, 210; *Story's Eq. Pl.* § 312, 441, 545.

³ *Cooper's Eq. Pl.* 118; *Story's Eq. Pl.* § 466.

⁴ 4 Bouv. Inst. 397.

tion is, that the subject of the suit is not within the jurisdiction of a court of equity. In general, when the plaintiff can have a remedy at law, as effectual as the one he seeks in equity, and that remedy is direct, certain, and adequate, a court of equity has no jurisdiction; and therefore a demurrer to the jurisdiction will be sustained.¹ But to induce equity to refuse its aid to a suitor, it is not sufficient that he may have *some* remedy at law. An existing remedy at law, to induce equity to decline the exercise of its jurisdiction in favour of a suitor, must be an adequate and complete one. And where, from the nature and complications of a given case, its justice can best be reached by means of the flexible machinery of a court of equity, in short, where a full, perfect, and complete remedy cannot be afforded at law, equity extends its jurisdiction in furtherance of justice.²

§ 610. An objection to the jurisdiction of the court, because the plaintiff has an adequate remedy at law, cannot regularly be taken after the defendant has answered on the merits. After a defendant has put in an answer in chancery, submitting himself to the jurisdiction of the court without objection, it is too late to insist that the complainant has a perfect remedy at law, unless the court be wholly incompetent to grant the relief sought by the bill.³ Such an objection, in those courts which have jurisdiction, both at common law and in equity, is considered as going rather to the form of the proceeding than to the jurisdiction of the court

¹ *Harrison v. Rowan*, 4 W. C. C. 205.

² *Bank of Virginia v. Adams*, 1 Pars. 541; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. 220; *Kirkpatrick v. McDonald*, 1 Jones, 393; *Skilton v. Webster*, Bright. R. 203; 1 *Curtis's Com.* § 21; 1 Pars. on Cont. 412-13.

³ *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. 222. See *Baker v. Biddle*, 1 Bald. 412, *contra*.

over the subject matter; and it can only be taken advantage of by demurrer.¹

§ 611. A demurrer lies, not only in cases where the plaintiff in the bill has a complete remedy at law, but also in cases where there is no remedy at law or in equity; or where there is no remedy in equity, though there may be one at law.² Thus, if a bill in equity show upon its face that the plaintiff's title is barred by the statute of limitations, the defendant may avail himself of this defence by demurrer;³ and the rule is the same where the defence arises from presumptions analogous to the statutory limitation. In such cases, the plaintiff is bound in the first instance to state the circumstances which take his case out of the rule.⁴

§ 612. A third ground of demurrer to the jurisdiction of a court of equity is, that some other court is invested with the proper jurisdiction. Thus, if a suit in equity should be brought in a state court to restrain the infringement of a patent right or of a copyright, the exclusive jurisdiction over which subjects is invested in the federal courts, a demurrer would be sustained. And so also, if it appear on the face of the bill that some other court, as a court of admiralty, or a register's court, has exclusive jurisdiction over the subject matter, a court of equity will not entertain jurisdiction.

§ 613. The objections arising from the personal disability of the plaintiff to sue, have already been considered;⁵ all, therefore, that need now be said on the subject is, that if any of these incapacities appear upon

¹ *Adams v. Beach*, 7 Leg. Int. 178; *Neel v. Neel*, 1 T. & H. Pr. 63; *Finley v. Aiken*, 3 Pittsburgh Leg. J. 1.

² 4 Bouv. Inst. 398.

³ *Wisner v. Barnet*, 4 W. C. C. 631.

⁴ *Lisle v. Croasdell*, Nisi Prius, 25 November 1854, Lewis, J. MS.

⁵ Ante, § 515, et seq.

the face of the bill, the defendant may demur. So also he may, if the incapacity be such only as prevents the party from suing alone, as in the case of an infant or a married woman, an idiot or a lunatic; in which case, if no next friend or committee be named in the bill, a demurrer will lie. And it is to be observed, that this objection extends, and advantage may be taken of it, as well in the case of a bill for discovery merely, as in the case of a bill for relief; for the defendant in a bill for discovery merely, being always entitled to costs after a full answer, as a matter of course, would be materially injured by being compelled to answer a bill exhibited by persons whose property is not at their own disposal, and who are therefore incapable of paying the costs.¹

§ 614. We come now to the consideration of demurrers arising upon objections applying more specifically to the matter of the bill; either as to its substance, or as to its form. The nature of these objections has been already discussed in our examination of the form and structure of bills. Demurrers to the substance of the bill may be, either that the plaintiff has no interest in the subject; or that, although the plaintiff has an interest, yet the defendant is not answerable to him, but to some other person; or that the defendant has no interest; or that the plaintiff is not entitled to the relief which he has prayed; or that the value of the subject matter is beneath the dignity of the court; or that the bill does not embrace the whole matter; or that there is a want of proper parties; or that the bill is multifarious, and improperly confounds distinct demands; or that the plaintiff's remedy is barred by lapse of time; or that it appears by the bill, that there is another suit depending for the same matter.²

¹ 1 Dan. Ch. Pr. 616; Mitf. Eq. Pl. 153.

² 1st Dan. Ch. Pr. 616.

§ 615. With respect to demurrers by reason of the deficiency of the bill, in matters of form, the grounds upon which they may be put have also been so amply stated before, that all which is necessary, is summarily to recall them to the reader's attention. They are, either because the plaintiff's place of abode is not stated; or because the facts essential to the plaintiff's right, and within his own knowledge, are not alleged *positively*; or because the bill is deficient in certainty; or because the plaintiff does not by his bill offer to do equity where the rules of the court require that he should do so; or to waive penalties or forfeitures where the plaintiff is in a situation to make such waiver; and to these may be added, the want of counsel's signature to the bill, and the absence of the proper affidavit, in those cases in which the rules of the court require that the plaintiff's bill should be accompanied by such an instrument.¹

§ 616. Where a bill is for discovery and relief, the defendant may demur to the relief and answer to the discovery; but he cannot demur to the discovery alone, and not to the relief, when the discovery is merely incidental to the relief; for that would be to demur, not to the thing required, but to the means by which it was to be obtained.² The grounds of demurrer to bills for discovery merely, have been sufficiently indicated in the chapter on discovery, to which the reader's attention is directed. And the same objections may be urged by way of demurrer to particular interrogatories in the plaintiff's bill, though not applicable to all the discovery. Under our practice, a defendant may by answer decline answering any interrogatory, or part of an interrogatory, from

¹ 1 Dan. Ch. Pr. 625.

² Story's Eq. Pl. § 312, 546.

answering which he might have protected himself by a demurrer.¹

§ 617. If an irregularity arise in any alteration of a bill by way of amendment, it may also be taken advantage of by demurrer; as if a plaintiff amend his bill and state a matter, arisen subsequently to the filing of the bill, which consequently ought to be the subject of a supplemental bill, the defendant may demur.² If, however, a matter which has arisen subsequently to the filing of the original bill, and is properly the subject of a supplemental bill, be stated by amendment, and the defendant answer the amended bill, it is too late to object to the irregularity at the hearing; unless the defendant has claimed the same benefit by his answer which he would have been entitled to, had he demurred to the amended bill, in which case he will be entitled to the benefit of the objection at the hearing.³

§ 618. An amended bill is liable to have the same objections taken to it, by demurrer, as an original bill; and even where a demurrer to the original bill has been overruled, a demurrer to an amended bill has been allowed. The rule is also the same where the defence first put in is a plea, and the bill is afterwards amended; the amended bill may still be demurred to. A defendant however cannot, after he has answered the original bill, if the plaintiff amend it, put in a general demurrer to the whole bill; because the answer to the original bill, being still on the record, will in fact overrule the demurrer. The defendant must, in such cases, confine his demurrer to the matter introduced by amendment.⁴

¹ Equity Rules, xlii. p. 126.

² Bank of Kentucky v. Schuylkill Bank, 1 Pars. 214.

³ 1 Dan. Ch. Pr. 649-50.

⁴ Ibid. 650.

§ 619. A demurrer may also be filed to a supplemental bill, wherever it appears upon its face that the plaintiff had no right to that species of bill either from want of title, or from mistake in pleading. As it is a general rule, that the court will not permit a supplemental bill to be filed but upon new matter, because the same end can generally be answered by amendment of the original bill; if a supplemental bill be brought upon matter arising before the filing of the original bill, where the suit is in that stage of the proceedings in which an amendment will be allowed, the defendant may demur.¹ And to enable a complainant in equity to file a supplemental bill, introducing matters which have arisen since the filing of the original bill, the original must be one on which some valid decree could be made by the court. If wholly defective, it cannot be made the basis of a supplemental bill; for if the complainant had no good ground for proceeding originally, he should file a new bill, showing a cause entitling him to relief.²

§ 620. The frame of a demurrer is very simple, and, after the formal commencement, runs thus: "This defendant doth demur in law to the said bill, and for cause of demurrer sheweth, that it appears by the said bill that, &c.," stating in the regular form, on what class of objection the defendant relies, or if there be more than one ground of objection, stating each ground successively with the prefatory words, "and for further cause of demurrer, this defendant sheweth, &c.," and concluding with the words, "wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur to the said bill, and prays judgment of this honourable court, whether he shall be compelled to

¹ 4 Bouv. Inst. 419.

² Bank of Kentucky v. Schuylkill Bank, 1 Pars. 214.

make any other answer thereto; and he humbly prays to be hence dismissed, with his reasonable costs in this behalf sustained.”¹ If a demurrer be accompanied by a plea, or by an answer, it should be entitled, “The demurrer of A. B., &c., to part of the bill of C. D., and the answer, &c., of the said A. B., to the remainder of the said bill of complaint.” Where it is to an amended bill, it need not be expressed in the title to be a demurrer to the original and amended bill; but a demurrer to the amended bill will be sufficient.²

§ 621. A demurrer, where it is not to the whole bill, proceeds to point out the parts of the bill to which it is intended to apply. Where a defendant demurs to part and answers to part of a bill, the court is not to be put to the trouble of looking into the bill or answer, to see what is covered by the demurrer; but it ought to be expressed in clear and precise terms, what it is that the party refuses to answer, so that the judge, upon a hearing of exceptions to the answer, should be able to ascertain, precisely, how far the demurrer goes, and what is to be answered. It is not a proper way of demurring to say, that the defendant answers to a particular fact and demurs to all the rest of the bill; for this would put the judge to great difficulty in saying what was demurred to, and whether the answer were sufficient or otherwise. The defendant ought to demur to a particular part of the bill, specifying it precisely.³ A demurrer, however, to all the bill, except as to a particular specified part, would not be open to the same objection; and where the exception applies to a very small part only of the bill, it has been held to be the best way of demurring. But in framing

¹ Adams' Eq. 333.

² 1 Dan. Ch. Pr. 652-3; 2 Ibid. 924.

³ 1 Dan. Ch. Pr. 653; *Devonsher v. Newenham*, 2 Sch. & Lef. 199, 205.

such a demurrer, care must be taken that it should appear distinctly by the demurrer itself, what part of the bill is to be included in the exception; for if it should be necessary to refer to the answer, for the purpose of ascertaining it, the demurrer will be bad.¹

§ 622. We have seen, that by the rule of court, a defendant may file a demurrer at any time before the bill is taken for confessed, or afterwards with the leave of the court.² In general, a demurrer is set down for argument by the plaintiff;³ but if the plaintiff neglect to do so, on the rule day on which the same is filed, or on the next succeeding rule day, the defendant may set it down himself, if the plaintiff shall fail to do so after ten days' notice.⁴ In the court of common pleas of Philadelphia, no case in equity can be put on the argument list, unless the party desiring it shall in writing require the prothonotary to do so, three days before the calling of the list; and to be entitled to have such case argued, it is also the duty of the party desiring it, to give three days' notice in writing to the opposite party, that the case is set down for argument.⁵

§ 623. On the hearing of the demurrer, the solicitors of the respective parties must each deliver a paper book, setting forth the substance of the case and the points to be discussed, to each of the judges, previously to the argument.⁶ And if, on the hearing, the demurrer be allowed, the court may in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it may deem reasonable.⁷

¹ 1 Dan. Ch. Pr. 653.

³ Ibid. xxxi. p. 123.

⁵ Rules of the Common Pleas, xvii. p. 47.

⁷ Equity Rules, xxxiii. p. 124.

² Equity Rules, xxx. p. 122.

⁴ Ibid. xxxvi. p. 124.

⁶ Rules of Court, 17, 33, 80.

§ 624. If the demurrer be overruled, unless the court is satisfied that it was intended for vexation and delay, the defendant will be assigned to answer the bill, or so much thereof as is covered by the demurrer, on the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, reasonably be done; in default whereof, the bill may be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly; and such decree will also be made if the court deem the demurrer to have been put in for vexation or delay, or to have been frivolous and unfounded.¹

§ 625. Where a demurrer is not to the whole bill, but is accompanied by an answer, the plaintiff, if he conceive that the defendant has not sufficiently answered that portion of the bill which is not demurred to, may except to the answer, but he must not do so before the demurrer has been argued, otherwise he will admit the demurrer to be good. It is said, however, that if the demurrer be to relief only, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the demurrer is argued.² And according to the English practice, where the demurrer is accompanied by answer, and the demurrer is overruled, if the complainant want a further answer, he must except to the answer already put in for insufficiency;³ but this would appear to be unnecessary under our rule of court.⁴

¹ Equity Rules, xxxii. p. 123.

² 1 Dan. Ch. Pr. 660; Mitf. Eq. Pl. 317.

³ *Many v. Beekman Iron Co.*, 9 Paige, 188, 196; 1 Dan. Ch. Pr. 675.

⁴ Ante, § 624.

CHAPTER VI.

PLEAS.

§ 626. A DEMURRER has been shown to be the proper mode of defence, where an objection is apparent upon the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it. Where an objection to the bill is not apparent on the bill itself, if the defendant mean to take advantage of it, he must show to the court the matter which creates the objection, either by answer, or by plea, which has been described as "a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred."¹

§ 627. The principle of a defence by plea is, that the defendant avers some one matter of avoidance, or denies some one allegation in the bill, and contends that, assuming the truth of all the allegations in the bill, or of all except that which is the subject of denial, there is sufficient to defeat the plaintiff's claim. It is applicable, like a demurrer, to any class of objections; but the most usual grounds of pleas are: 1. Want of jurisdiction: 2. Personal disability in the plaintiff: 3. A decision already made by a court of competent jurisdiction, or a suit al-

¹ Mitf. Eq. Pl. 219; 2 Dan. Ch. Pr. 677. The proper office of a plea in chancery, is to bring forward some fact, not distinctly appearing in the bill, which displaces the equity. *Union Branch Railroad Co. v. E. Tennessee and Georgia Railroad Co.*, 2 Am. L. R. 309.

ready pending in a court of equity respecting the same subject; if there be a pending action at law, the proper course is to put the plaintiff to his election, by motion, which court he will proceed in: 5. Want of equity where the equity depends on a single point.¹

§ 628. The defence proper for a plea is, such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit, or to the part of it to which the plea applies. The matter pleaded must reduce the issue between the plaintiff and defendant to a single point; if it be double, that is, tender more than one defence as the result of the facts stated, it will be bad. It is not, however, necessary that it should consist of a single fact, for though a defence offered by way of plea, consists of a great variety of circumstances, yet, if they all tend to one point, it will be good.² But although the ordinary practice in courts of equity does not admit of several pleas, yet where great inconvenience might otherwise be sustained in a particular case, the court will sometimes, in its discretion, allow several pleas.³

§ 629. The rule, that a defendant cannot plead several matters, must not be understood as precluding a defendant from putting in several pleas to different parts of the same bill; it merely prohibits his pleading, without previous leave, a double defence to the whole bill, or to the same portion of it. A defendant may plead different matters to separate parts of the same bill, in the same manner that (as we have seen) a defendant may put in different demurrers to the same bill. A defendant may, in like manner, plead and demur, or plead and answer,

¹ Adams' Eq. 336.

² 2 Dan. Ch. Pr. 677; *Saunders v. Druce*, 25 Law Times R. 124.

³ Story's Eq. Pl. § 657; *Saunders v. Druce*, *ut supra*.

to the different parts of the same bill, provided he point out distinctly the different portions of the bill which are intended to be covered by the plea, the demurrer, and the answer: he must likewise, where he puts in several pleas to the same bill, point out to what particular part of the bill each plea is applicable.¹

§ 630. The same rule, however, which is applicable to demurrers, is applied also to pleas; namely, that no plea shall be held bad and overruled, upon argument, merely because such plea shall not cover so much of the bill as it might by law have extended to; or solely because the answer of the defendant may extend to some part of the same matter as may be covered by the plea.² And although the general rule is, that in the case of a partial plea, the defendant must specify distinctly what part of the bill he pleads to, the rule which has been stated as applicable to a demurrer, viz., that it cannot be good in part and bad in part, is not applicable with the same strictness to a plea; for it has been repeatedly decided, that a plea in equity may be bad in part and not in the whole, and the court will allow it to so much of the bill as it is properly applicable to.³ This, however, is to be understood only with reference to its extent, that is, to the quantity of the bill covered by it, and not to the ground of defence offered by it; for if any part of the defence made by the plea be bad, the whole must be overruled.⁴

§ 631. Where a plea merely states matter not apparent upon the bill, and relies upon the effect of such matter as a bar to the plaintiff's claim, it is called an affirmative or

¹ 2 Dan. Ch. Pr. 685.

² Equity Rules, xxxiv., xxxv., p. 124; Saunders v. Druce, ut supra.

³ Kirkpatrick v. White, 4 W. C. C. 595, 600.

⁴ 2 Dan. Ch. Pr. 685-7.

pure plea. Such pleas usually proceed upon the ground that, admitting the case stated by the bill to be true, the matter suggested by the plea affords a sufficient reason why the plaintiff should not have the relief he prays, or the discovery which he seeks; and where they are put in, the court, in order to save expense to the parties, or to protect the defendant from a discovery which he ought not to make, instantly decides upon the validity of the defence, taking the plea and the bill, so far as it is not contradicted by the plea, to be true.¹

§ 632. A pure plea, in general, must be founded on new matter not apparent on the bill; it must not only reduce the cause to a single point, but to such a point that the plaintiff may, if he choose, take issue upon it; and it must be direct and positive, and not state matters by way of argument, inference, and conclusion, which have a tendency to create unnecessary prolixity and expense.²

§ 633. Although pleas generally consist of the averment of some new fact or chain of facts, not apparent upon the face of the bill, the effect of which is not to deny the facts of the bill, but admitting them, *pro hac vice*, to be true, to destroy their effect; there are cases in which the plea, instead of introducing new facts, merely relies upon a denial of the truth of some matter stated in the bill upon which the plaintiff's right depends; or which re-asserts some facts stated in the bill, and which the bill seeks to impeach, and denies all the circumstances which the plaintiff relies upon as the ground upon which he seeks to impeach the fact so set up. These are called negative pleas; and sometimes

¹ 2 Dan. Ch. Pr. 678; Mitf. Eq. Pl. § 295.

² Story's Eq. Pl. § 660-5.

pleas not pure, or anomalous pleas.¹ This class of pleas has two peculiarities: in the first place, it relies wholly upon matters stated in the bill, negating such facts as are material to the plaintiff; and in the next place, it requires an answer to be filed, which is subsidiary to the purposes of the plea: a pure plea never requires any such answer.²

§ 634. An answer is required in such cases, because the plaintiff has a clear right in equity to a discovery as to all matters within the knowledge of a defendant, which would enable him to support his case; and it would be against that principle, if a defendant could, by merely denying the existence of the claim, deprive the plaintiff of the means of proving its validity. The cases in which it is necessary that a plea should be supported by an answer, have been very conveniently divided into: 1. Those where the plaintiff admits the existence of a legal bar, and charges some equitable circumstances to avoid its effect: 2. Those where the plaintiff does not admit the existence of any legal bar, but states some circumstances which may be true, and to which there may be a valid ground of plea, together with other circumstances which are inconsistent with the substantial validity of the plea.³

§ 635. With respect to the first class of cases, the limits to which the plea and answer respectively extend, are plainly marked, and create no difficulty. The most simple cases of this class, are those in which pleas are put in to bills to impeach a decree, on the ground of fraud used in obtaining it; to avoid the effect of a judgment

¹ 2 Danl. Ch. Pr. 678. Story's Eq. Pl. § 667.

² Story's Eq. Pl. § 670.

³ 2 Dan. Ch. Pr. 692; Hare on Discovery, 30; Story's Eq. Pl. § 674; Ferguson v. O'Harra, 1 P. C. C. 494; Sims v. Lyle, 4 W. C. C. 304.

by a court of ordinary jurisdiction; to set aside a release or an award; or to open a stated account. In all these cases, and others which fall under a similar principle, the bill, having admitted the existence of a fact which, taken alone, would be conclusive against the plaintiff, and then having proceeded to state specific grounds upon which that fact, though formally and ostensibly in existence, yet ought not to have the effect of concluding the plaintiff, which ordinarily it would have, the defendant can readily decide to what he may plead, and to what he must answer. The bill is an express guide; the plaintiff has pointed out the particular circumstances upon which he relies to overcome the anticipated bar: with regard to these the principles of equity require a discovery.¹

§ 636. In the second class of cases, it is not so easy to define the limits to which the plea and answer are to extend; it may, however, be laid down as a general rule, that where no ostensible bar is in the bill admitted to exist, and yet the defendant would plead in bar to the bill, he must distinguish those facts which, if true, would not invalidate or disprove his plea, and plead to the relief and discovery sought as to them; and then answer to the facts which, if true, would disprove or invalidate his plea; and also to those matters which are specially alleged as evidence of such facts.²

§ 637. The great difficulties which, in these cases, formerly resulted from the circumstance, that the bill usually contained statements which, although covered by the plea, were in part also such as the defendant was bound to answer, have been removed by the orders of the court, which direct that the plea is not to be overruled, because the defendant has submitted to answer

¹ 2 Dan. Ch. Pr. 693.

² Hare on Discovery, 34.

the part of the bill covered by the plea. This order, however, leaves untouched the rules which compel the defendant to answer all such parts of the bill as contain statements of facts which, if true, would be evidence to disprove the fact pleaded.¹ For where the bill alleges facts which, if true, would contradict the plea or be evidence to discredit the plea, the plea must be supported by an answer, if not denying, at least, giving the plaintiff discovery as to those facts; and there is no distinction between the greater or less degree of materiality of those facts, assuming them to be to some extent material.²

§ 638. In regard to the form of a plea and answer in support of it, it is well settled, that the plea itself as well as the answer, must contain averments negating the facts and circumstances so set up in the bill, in avoidance of the bar or defence. For otherwise the plea will not amount to a complete defence to the bill; since the denial of those facts and circumstances is, in truth, the only point in controversy.³ But as the averments, negating the facts charged in the bill, are used merely to put those facts, as alleged by the bill, in issue in the plea; they may be expressed in the most general terms, provided they be sufficient to put the charges contained in the bill fully in issue.⁴

¹ *Young v. White*, 23 Eng. L. & Eq. 520. ² *Hunt v. Penrice*, Ibid. 328.

³ *Story's Eq. Pl.* § 680. The object of an averment in a plea is this: in some pleas, to meet statements made by the bill, in order to negative the intendment which might otherwise be made against the plea; as, for example, in a plea of a stated account, where the bill contains no positive charge of fraud, then the plea should be supported by an averment that the account delivered was a just and true account: again, if a bill contain statements, but no distinct charges going to support an answer to the defendant's case, then those statements should be met by averment as well as by plea. *Saunders v. Druce*, 25 Law Times R. 124.

⁴ *Story's Eq. Pl.* § 691.

§ 639. The answer in support of a plea is no part of the defence; the defence is the matter set up by the plea: the answer is that evidence which the plaintiff has a right to require and use, to invalidate the defence made by the plea; and therefore, it must be full and clear, otherwise it will not support the plea; for the court will intend all matters charged in the bill, to which the plaintiff is entitled to an answer, to be against the pleader, unless they be fully and clearly denied. If the answer should not be full in all material points, the court will presume, that the facts and circumstances charged in the bill may be capable of proof in the point not fully answered, and will not, therefore, deem the answer sufficient to support the plea; and upon that ground will overrule the plea.¹

§ 640. A plea, like a demurrer, may be either to the relief, or to the discovery, or to both. Pleas in equity to the relief, prayed by the bill, are usually ranged under four heads: 1. To the jurisdiction: 2. To the person of the plaintiff or defendant: 3. To the frame of the bill: 4. In bar of the suit.²

§ 641. Those pleas, which are commonly called pleas to the jurisdiction, do not proceed the length of disputing the right of the plaintiff to the subject of the suit, or allege any disability on the part of the plaintiff to prosecute the suit; but simply assert, that the court in which the suit is brought, is not the proper court to take cognizance of those rights. Pleas to the person also, do not dispute the validity of the rights which are the subject of the suit, or deny that the court has jurisdiction over them; but they assert that the plaintiff is incapa-

¹ 2 Dan. Ch. Pr. 710-11.

² Ibid. 713.

citated to sue, or that the defendant is not the person who ought to be sued.¹

§ 642. Pleas to the frame of the bill do not dispute the validity of the right made the subject of the suit, or contend that the court has not generally jurisdiction over it, nor do they allege that the plaintiff is under any disability to sue, or that the defendant ought not to be sued; but they assert that the suit, as it appears on the record, is defective to answer the purpose of complete justice, or ought not, for some other reason, to proceed.² Thus, where a bill seeks relief, a defendant may plead that there is another suit already depending in the same, or in another court of equity for the same matter. For it is impossible to administer justice, and it never has been done in any civilized country, without adopting the rule, that a party who brings one suit in a court of competent jurisdiction, must finish it before he can be allowed to prosecute another.³

§ 643. To a suit for relief, brought in the supreme court, the defendant may plead a former suit pending for the same matter, on the equity side of a court of common pleas or district court, within this state. For purposes of original jurisdiction in equity, the powers of the supreme court are not greater than those of the common pleas, except in reference to locality. Their jurisdiction is co-extensive with the boundaries of the commonwealth; that of the common pleas is limited to the county, in which the court is situate; but within the limits of the county, the remedy is as ample, the jurisdiction as complete, and the decree as conclusive, in the common pleas

¹ Ibid. 714; Beames on Pleas, 55.

² 2 Dan. Ch. Pr. 715; Beames on Pleas, 59, 60.

³ Cleveland, Painesville and Ashtabula Railroad Co. v. City of Erie, Sup. Court, 29 January 1855. MS.

as in the supreme court, except that the latter court may review the action of the former on appeal.¹

§ 644. Where such a plea is put in, the plaintiff, instead of setting it down for argument, may procure an order to refer it to a master, to certify the truth thereof; and if the two bills appear to be brought for the same matter, all proceedings on the last one are immediately stopped. This is done on the principle that the party has no right to be heard, or to have anything done for him on a second bill, while a previous one is undisposed of. The court may, it is true, under certain circumstances, dismiss the first bill and proceed upon the second; but this, of course, can only be when both suits are in the same court; and to induce the court to exercise this discretion, the second bill must embrace the whole subject in dispute more fully than the first.²

§ 645. A plea which offers any matter tending to show that the bill, as framed, is insufficient to answer the purposes of complete justice, must, it is evident, be ranked amongst this class of pleas; for it does not, in general, dispute the right of the plaintiff, as stated in the record, but merely offers a reason why the suit should not proceed as framed.³ These objections are, generally, the want of sufficient parties to the bill; or that the bill is multifarious, joining and confounding distinct matters in one suit;⁴ both of these subjects have already been sufficiently discussed.

§ 646. We now come to the consideration of pleas in bar, which may be distinguished from all other pleas, as they admit the jurisdiction of the court, and do not dispute the ability of the plaintiff to sue, and the liability

¹ Ibid.

² Ibid.

³ 2 Dan. Ch. Pr. 727.

⁴ Ibid.; Story's Eq. Pl. § 735.

of the defendant to be sued, and tacitly concede that there are none of those objections to the suit which constitute the grounds of pleas to the bill; but yet they allege matter, which, if true, destroys the claim made by the suit, and by showing that the right made the subject of the suit has no existence, or that it is vested in the defendant, they put an end to all litigation respecting it.¹ Such pleas are usually divided into: 1. Pleas, founded on some bar created by statute: 2. Pleas, founded on matter of record, or as of record, in some court: 3. Pleas of matter purely *in pais*; that is, upon matter of fact, which is not of record.²

§ 647. Any statute, public or private, which may be a bar to the demands of the plaintiff, may be pleaded, with the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar created by the statute. And first, as to the statute of limitations. A chancellor applies the statute of limitations with the same substantial effect that it receives in a court of law.³ Indeed, when the objection appears on the face of the bill, it may, as we have seen, be taken advantage of by demurrer.⁴ If it does not so appear, the statute must be pleaded, and it will, in general, bar both the relief sought by the bill, and also the discovery when the debt became due.⁵

§ 648. An opinion was formerly pretty generally entertained, that trust estates were not within the statute of limitations. But the rule in court of equity, that the statute of limitations does not bar a trust estate, holds

¹ Beames on Pleas, 62, 65. ² Story's Eq. Pl. § 749; 2 Dan. Ch. Pr. 728.

³ Hamilton v. Hamilton's Executors, 6 Harris, 22; Smilie v. Biffle, 2 Barr, 53-1.

⁴ Ante, § 611; Ferris v. Henderson, 2 Jones, 49-50. ⁵ Mitf. Eq. Pl. 269.

only as between *cestui que trust* and trustee, not between *cestui que trust* and trustee on the one side, and a stranger on the other; for that would be to make the statute of no force at all. Therefore, where *cestui que trust* and trustee are both out of possession, for the time limited, the party in possession has a good bar against both. A party obtains an inceptive title by an adverse holding, subject to be defeated only by the entry of the owner of the legal estate, at any time within twenty-one years. And the trustee may be compelled by the *cestui que trust* to enter, so as to avoid the adverse possession; and the *cestui que trust* may himself enter as a defeasor. It would seem to be an anomaly, that the owner of the legal estate should be barred, and that the owner of the equitable title, whether his interest be an interest in possession or by way of remainder, should nevertheless be entitled to enter.¹

§ 649. It is to be observed, however, that against a right of action dependent on the existence of a secret fraud, the statute of limitations runs but from the period of its discovery;² because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. If the aggrieved party knew of the fraud when committed, or had full possession of the means of detecting it, which is the same thing as knowledge, it will deprive him of his remedy.³ A court of equity cannot impeach a transaction on the ground of fraud in obtaining the possession, if the fact of the alleged fraud were within the knowledge of the party twenty-one years before, during all which time it was open to him to prose-

¹ *Smilie v. Biffle*, 2 Barr, 52-3.

² *Pennock v. Freeman*, 1 Watts, 410.

³ *Ferris v. Henderson*, 2 Jones, 53-4; *Jones v. Conoway*, 4 Yeates, 111. See *Harrisburg Bank v. Forster*, 8 Watts, 12.

cute his claim. After the discovery of the fraud, a man has a right to avail himself of the statute; but so long as the fraud is unknown, pending the concealment of the fraud, the statute ought not to run. The discovery of the fraud gives a new right of action.¹

§ 650. A plea of the statute of limitations must contain sufficient affirmative averments to bring the case within the statute pleaded. And whenever any matters are stated in the bill, which are calculated to take the case out of the statute, these must be met by negative averments. Thus, if the bill charge fraud, the plea must deny the fraud, or aver that the fraud, if any, was discovered above six years before the filing of the bill. And moreover, if there be any statements in the bill which allege matters ancillary to, or afford evidence of facts directly negatived by the plea, such statements ought to be met by an answer in support of the plea.²

§ 651. The statute for the prevention of frauds and perjuries,³ may also be pleaded in bar to a suit to which the provisions of that act apply. Thus, to a bill for the specific performance of a contract or agreement respecting lands, the defendant may plead the statute, and by negative averments insist, that there has been no contract or agreement in writing signed by the parties.⁴ As, however, it is now well settled, that the benefit of the statute may be had, if insisted on, by answer, although a *parol* agreement be admitted, there can be little use in pleading it in bar, at least in bills seeking the specific performance of a contract.⁵

§ 652. The statute of limitations, and the statute for

¹ Thompson v. Smith, 7 S. & R. 214; Riddle v. Murphy, Ibid. 235.

² 2 Dan. Ch. Pr. 746.

³ Purd. Dig. 627.

⁴ Story's Eq. Pl. § 761; 2 Dan. Ch. Pr. 747.

⁵ 2 Dan. Ch. Pr. 751.

the prevention of frauds and perjuries, are those which are most frequently pleaded; but any other public or private statute, which may be a bar to the demand of the plaintiff, may be taken advantage of, by a plea containing the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar which the statute creates.¹

§ 653. We now come to the consideration of those pleas in bar, which consist of matters recorded, or as of record, in the court itself, or some other court of equity; or in some other court not a court of equity. After a judgment or decree by a tribunal of competent jurisdiction, another complaint, grounded on the same facts, will not be listened to, either by the same tribunal or by a different one.² And therefore, a decree or order of the court, by which the rights of the parties have been determined, or another bill for the same matter dismissed, may be pleaded to a new bill for the same matter; and this, even if the party bringing the new bill were an infant at the time of the former decree: for a decree enrolled can only be altered by a bill of review.³ A decree cannot, however, be pleaded in bar of a new bill, unless it be for the same matter as the bill to which it is pleaded; and the decree must also be in its nature final, or afterwards made so by order, or it will not be a bar.⁴

§ 654. The judgment of a court of ordinary jurisdiction, is also a matter of record, which may, in general, be pleaded in bar to a suit in chancery, provided such judgment have finally determined upon the rights of the parties. But it must appear that such court had full

¹ 2 Dan. Ch. Pr. 752.

² Cleveland, Painesville and Ashtabula Railroad Co. v. City of Erie, Sup. Court, 29 January 1855. MS. *Burhans v. Van Zandt*, 3 Seld. 524.

³ 2 Dan. Ch. Pr. 753.

⁴ *Ibid.* 754.

jurisdiction to determine the rights of the parties, and also that the judgment or sentence is a final one, and not an interlocutory proceeding.

§ 655. Pleas of matters purely *in pais*, have still to be considered. The principal of these are a release; a stated account; a settled account; an award; a purchase for a valuable consideration; and a plea of title in the defendant.¹ And there are likewise other pleas and defences which may be pleaded in bar in equity; such, for example, as a plea of accord and satisfaction, and others of a kindred nature.²

§ 656. If the plaintiff, or a person under whom he claims, have released the subject of his demand, the defendant may plead the release in bar of the bill; and this will apply to a bill praying that the release may be set aside. A release, however, to be an effectual bar to an account, must be under seal, otherwise it must be pleaded as a stated account only. In a plea of release, the defendant must set out the consideration upon which it was made; for every release must be founded upon some consideration, otherwise fraud must be presumed. A plea of release, therefore, cannot extend to a discovery of the consideration; for if that be impeached by the bill, the plea must be assisted by averments covering the ground upon which the consideration is so impeached, and must be supported by an answer denying the imputations charged in the bill.³

§ 657. A plea of a stated account, or of a settled account, is also a good bar to a bill for an account. A stated account properly exists, only where accounts have been examined and the balance admitted as the true

¹ Story's Eq. Pl. § 795.

² *Brown v. Perkins*, 1 Hare, 564, 570.

³ 2 Dan. Ch. Pr. 766.

balance between the parties, without having been paid. When the balance thus admitted is paid, the account is deemed a settled account.¹ A defendant pleading a stated account must, whether error or fraud be charged or not, aver that the stated account is just and true to the best of his knowledge and belief; and if specific errors or fraud be charged in the bill for the purpose of impeaching the account, they must be denied by averments in the plea, as well as by answer in support of the plea.²

§ 658. It may be observed here, that when fraud is proved to have taken place in the settlement of an account, it will be a sufficient ground to open the whole account. The case, however, is different where errors or mistakes only are shown to exist in the account; for there the account will not be opened, but the party will be permitted merely to surcharge and falsify it. And this is an important distinction, because where an account is opened, the whole of it may be unravelled, and the parties will not be bound by deductions agreed upon between them on taking the former account; but where a party has liberty to surcharge and falsify, the *onus probandi* is always on the party having the liberty; for the court takes it as a stated account and establishes it; but if the party can show an omission for which there ought to be credit, it will be added, which is a surcharge; or if any wrong charge be inserted, it will be deducted, which is a falsification. This, however, must be done by proof on his side.³

§ 659. An award may be pleaded in bar to a bill which seeks to disturb the matter submitted to arbitration. It may likewise be pleaded to a bill to set aside the award and open the account; and it is not only a good defence

¹ Story's Eq. Pl. § 798.

² 2 Dan. Ch. Pr. 763-4.

³ Ibid. 764-5.

to the merits of the case, but also to the discovery sought by the bill. If, however, the bill impeach the award upon grounds of fraud, corruption, or mistake, those charges must be denied, both by averments in the plea and by answer in support of it; and every other matter stated in the bill, as a ground for impeaching the award, must be denied in the same manner.¹

§ 660. A defendant may also plead in bar, that he is a *bonâ fide* purchaser of the property in dispute, for a valuable consideration, without notice of the plaintiff's title;² for a court of equity will give no assistance against a defendant occupying such a position.³ If the bill, however, as it usually does, state facts from which notice of an adverse claim may be inferred; it is not sufficient, as we have seen,⁴ to plead a purchase without notice, actual or constructive; but the defendant must, by a full, clear, and substantial answer, (not merely as to knowledge and belief) as well as by averment in his plea, deny the facts from which notice is inferred; and must plead that the vendor was in possession by himself or tenant, and that he had no notice before the conveyance, and before the purchase money actually paid, not merely secured to be paid.⁵

§ 661. If the defendant's title be paramount to that of the plaintiff, he may plead it in bar of the suit. This plea of title in the defendant, is generally founded either on a long peaceable possession by the defendant, and those under whom he claims; or on a will, or a conveyance. In all pleas of title, whether derived under a will or a deed, if the defendant be not the person taking im-

¹ Ibid. 767-8; Story's Eq. Pl. § 803.

³ Scott v. Burton, 2 Ash. 329.

⁵ Lewis v. Bradford, 10 Watts, 80.

² See ante, § 488, et seq.

⁴ Ante, § 490.

mediately under the will or deed, but derive his title through others, the title of the defendant must be deduced from the person immediately taking, by proper averments in the plea. And in all cases, it is necessary, whether the title be derived from adverse possession, or from a will or conveyance, to show that it had a commencement anterior to that of the plaintiff's title as shown by the bill: a title posterior to that of the plaintiff will not avail as a plea, unless it be in some way connected with the plaintiff's title.¹

§ 662. Pleas to amended bills may be put in upon the same grounds as pleas to original bills. But it is to be observed, that if a defendant have answered the original bill, his answer may be read to counterplead his plea to the amended bill; and if upon reading it, it should appear that the facts stated upon the answer to the original bill would operate to avoid the defence made by the plea to the amended bill, the plea will be overruled.²

§ 663. Every plea must be accompanied by the certificate of counsel, that in his opinion it is well founded in point of law; and must be supported by the affidavit of the defendant, that it is not interposed for delay, and that it is true in point of fact.³ If a plea be not verified by the oath of the defendant, the plaintiff may apply for an order to set it aside, or to have it taken off the files of the court; but he cannot make the objection upon the argument of the plea;⁴ the irregularity is one which can be waived by the plaintiff's taking any proceeding upon it.⁵

§ 664. Upon a plea being filed, the plaintiff may either

¹ 2 Dan. Ch. Pr. 769, 772.

² Ibid. 780.

³ Equity Rules, xxix. p. 122.

⁴ *Heartt v. Corning*, 3 Paige, 566.

⁵ 2 Dan. Ch. Pr. 790.

set it down to be argued, or he may take issue upon it.¹ And if the plaintiff do not reply to the plea, or set it down for argument, on the next rule day, when the same is filed, the defendant may set it down for argument, if the plaintiff shall fail or neglect so to do, after ten days' notice.² And care should be taken by the plaintiff, not to except to the answer in support of a plea, if there be any doubt as to the sufficiency of the plea; for the taking of exceptions to the answer will, under such circumstances, have the effect of allowing the plea, in the same manner as a replication to the plea would do. The true course in such a case is, first to set down the plea for argument; and if it should be held good, the answer may then be excepted to for insufficiency.³

§ 665. If, upon the hearing, the plea be allowed, the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it may deem reasonable.⁴ If, on the contrary, the plea be overruled, unless the court be satisfied that it was intended for vexation and delay, the defendant will be assigned to answer the bill, or so much of it as is covered by the plea, on the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, reasonably be done; in default of which the bill will be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly; and such decree will also be made, if the court deem the plea to have been for vexation or delay, and to have been frivolous and unfounded.⁵

¹ Equity Rules, xxxi. p. 123.

² Ibid. xxxvi. p. 124.

³ Story's Eq. Pl. § 689.

⁴ Equity Rules, xxxiii. p. 124.

⁵ Ibid. xxxii. p. 123.

§ 666. If the plaintiff reply, he thereby makes as full an admission of the validity of the plea, as if it had been allowed upon argument; so that if the defendant, at the hearing, prove his plea to be true, the bill must be dismissed.¹ As the replication denies all the matter of the plea, the latter must be supported by evidence. In this it differs from an answer, which, if responsive to the bill, must be overcome by evidence on the part of the plaintiff; but a plea is always in avoidance of the bill, and never responsive to it; and, of course, it stands for nothing, as evidence of the facts pleaded.²

§ 667. If a plea be allowed simply, it is thereby determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, be true; and the plaintiff, in such case must take issue upon it, and proceed to disprove the facts upon which it is endeavoured to be supported.³ It sometimes happens, however, that upon the argument of a plea, the court considers that although, so far as then appears, it may be a good defence, yet there may be matter disclosed in evidence, which, supposing the matter pleaded to be strictly true, would avoid it; in such case the court, in order that it may not preclude the question by allowing the plea, directs that the benefit of it shall be saved to the defendant at the hearing. The effect of such an order is, to give the plaintiff an opportunity of replying and going into evidence without overruling the plea.⁴

§ 668. If, upon argument, the court consider that the matter offered by way of plea may be a defence, or part of a defence, but that it has been informally pleaded, or is not properly supported by the answer, so that the truth

¹ 2 Dan. Ch. Pr. 795.

² *Gernon v. Bocaline*, 2 W. C. C. 199.

³ 2 Dan. Ch. Pr. 797.

⁴ *Ibid.* 799-800.

is doubtful, it will, in such case, instead of overruling the plea, direct it to stand for an answer. If a plea be ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, unless by the order liberty be given to the plaintiff to except. The order for the plea to stand for an answer is, however, frequently accompanied with a direction that the plaintiff shall be at liberty to except; but the liberty is sometimes qualified so as to protect the defendant from any particular discovery, which he ought not to be called upon to make.¹ If the court, upon argument, be of opinion that the plea cannot, under any circumstances, be made use of as a defence, it is simply overruled; and the defendant, as we have seen, must put in his answer to the bill; or the court may if it deem the plea to have been vexatious and frivolous, direct the bill to be taken *pro confesso*.²

¹ 2 Dan. Ch. Pr. 801.

² Ante, § 665.

CHAPTER VII.

ANSWERS.

§ 669. If a defendant can neither protect himself, by demurrer nor plea, from answering the plaintiff's bill, nor disclaim all right and interest in the subject of the suit, he must put in an answer, either to the whole bill, or to such parts of it as are not covered by his demurrer or plea.¹ The defence by answer is the most usual, and generally the most advisable course. It puts on the record the whole case of the defendant, enabling him to use all or any of his grounds of defence, subject only to the necessity of verifying them on oath; and an objection, which might have been made by demurrer or plea, will in most cases be equally a bar to relief when insisted on by answer, although it will not excuse the defendant from giving the discovery required by the bill.²

§ 670. There is no principle more clearly established in courts of chancery than this, that when a party answers he is bound to answer fully; and for this, amongst other reasons, that if the defence which a party sets up by the answer should be decided against him, it is of the utmost importance that all consequential matters, which are material for the purpose of the suit, should receive an answer.³ The nature of the answer, which a plaintiff

¹ 2 Dan. Ch. Pr. 813.

² Adams' Eq. 342.

³ 2 Dan. Ch. Pr. 825-6.

has a right to require from each defendant upon the record, is sufficiently shown by the form of words made use of in the bill requiring an answer, namely, that the defendants “may, upon their several and respective corporate oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectfully required to answer.”¹

§ 671. This rule, that if a defendant submit to answer, he shall answer fully to all the matters of the bill, does not, however, now apply in cases where he might, by plea, protect himself from such answer and discovery. And the defendant is entitled in all cases, by answer, to insist upon all matters of defence (not being matters of abatement, as to the character of the parties, or to matters of form) in law, of or to the merits of the bill, of which he might be entitled to avail himself by a plea in bar; and in such answer he is not compellable to answer any other matters than he would be compellable to answer and discover, upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defence. Thus for example, a *bonâ fide* purchaser for a valuable consideration, without notice, may set up the defence by way of answer, instead of plea, and is entitled to the same protection, and will not be compelled to make any further answer or discovery of his title, than he would be in any answer in support of such plea.²

§ 672. A defendant is also at liberty, by answer, to decline answering any interrogatory, or part of an inter-

¹ Equity Rules, xli. p. 126.

² Ibid. xxxvii. p. 124.

rogatory, from answering which he might have protected himself by demurrer: and he is at liberty so to decline, notwithstanding he may answer other parts of the bill, from which he might have protected himself by demurrer.¹ A defendant may, therefore, by his answer, deny the principal fact upon which the equity of the plaintiff's bill is founded, and decline making any discovery consequent upon the equity so denied. Wherever a plea will protect him from discovery his answer will have the same effect.²

§ 673. There are some other exceptions to the general rule, that a defendant who submits to answer must answer fully. Thus, he is not bound to answer to matters which are purely scandalous, or impertinent, or immaterial, or irrelevant.³ A complainant who calls upon a defendant to answer in chancery, makes him, in effect, a witness in his own cause. If he have any reason, either of fact or law, why he should not comply with this requisition, he must, in general, set it forth by plea or demurrer; and if he do not, and submit to answer, he will be affected with all the obligations of a witness, one of which is that of telling the whole truth, and not merely that part of it which may suit his own interest. But though a witness is bound to tell the whole truth, he is only bound to tell it so far as it relates to the matter in controversy, and will not be compelled, or even permitted, to tell anything more. The rule, that a defendant who answers, must answer fully, only means therefore, that he must answer the statements in the plaintiff's bill, and the interrogatories, so far as they are founded on those statements,

¹ Equity Rules, xlii. p. 126.

² *Perry v. Kinley*, 3 Am. L. R. 183; 11 Leg. Int. 107.

³ Story's Eq. Pl. § 846.

and not that he will be compelled to answer questions which are either impertinent or irrelevant.¹

§ 674. A defendant is likewise not bound to answer to anything which may subject him to any penalty, forfeiture, or punishment. If a question involve a criminal charge, the plaintiff is not entitled to an answer to such question, however material it may be to his case. And so far has this rule been carried, that when the facts are such, as a defendant will not be compelled to answer, he cannot be required to answer the attendant circumstances, although they have not such an immediate tendency to criminate; the rule in these cases being, that a defendant is at liberty to protect himself against answering, not only the direct question, whether he did what was illegal, but also every question fairly appearing to be put with the view of drawing from him an answer, containing nothing to affect him, except as it is one link in a chain of proof that is to affect him.²

§ 675. Thus also we have seen, that a defendant is not bound to answer what would involve a breach of professional confidence.³ Nor is he bound to discover facts respecting his own title; but merely those which respect the title of the plaintiff.⁴ In all these cases, although the defendant may protect himself from discovery by plea or demurrer, yet he has also always been permitted to decline by his answer giving the objectionable discovery, and to state in that form the grounds upon which he claims protection.⁵

§ 676. An answer, in cases where relief is sought, properly consists of two parts; and, in fact, performs a

¹ *Waldron v. Bayard*, 11 Leg. Int. 79.

² *Bank of United States v. Biddle*, 2 Pars. 58-9.

⁴ *Werne v. Berners*, 11 Leg. Int. 78.

³ *Ante*, § 482.

⁵ 2 Dan. Ch. Pr. 821-2.

double office. It consists, first, of the defence of the defendant to the case made by the bill; and secondly, of the examination of the defendant on oath, as to the facts charged in the bill of which a discovery is sought, and to which interrogatories are usually addressed.¹ But although an answer has, in general, this twofold property, it is seldom possible, in framing one, to keep the parts separate from each other, though when it is practicable to do so, such a course is generally desirable. It is, however, of great importance to the pleader, in preparing an answer, to bear in mind, that besides answering the plaintiff's case as made by the bill, he has to state to the court, upon the answer, all the circumstances of which the defendant intends to avail himself by way of defence; for it is a rule, that a defendant is bound to apprise a plaintiff, by his answer, of the nature of the case he intends to set up, (and that, too, in a clear unambiguous manner) and that he cannot avail himself of any matter in defence which is not stated in his answer, even though it should appear in his evidence.²

§ 677. An answer must be full and perfect to all the material allegations in the bill; it must confess, avoid, deny, or traverse, all the material parts of it; it must state facts, and not arguments: it is not sufficient that it contains a general denial of the matters charged; but there must be an answer to the sifting inquiries upon the general subject: it should also be certain in its allegations, as far as practicable. To so much of the bill, as it is necessary and material for the defendant to

¹ Story's Eq. Pl. § 850.

² 2 Dan. Ch. Pr. 814; Robinson v. Cathcart, 3 Cr. C. C. 385; Kelsey v. Western, 2 Comst. 506.

answer, he must speak directly and without evasion; and he must not merely answer the several charges literally; but he must confess or traverse the substance of each charge.¹ A defendant, however, is not bound to answer any interrogatory, except those which he is specially required to answer by the note at the foot of the bill.²

§ 678. A defendant must answer "as to his knowledge, remembrance, information, and belief." And in general, if a fact be charged which is in the defendant's own knowledge, as if done by himself, he must answer positively and not to his remembrance or belief only, if it be stated to have happened within seven years before: it seems, however, that where a special cause is shown, so positive an answer may be dispensed with. As to facts which have not happened within his own knowledge, the defendant must answer as to his information and belief, and not as to his information merely, without stating any belief either one way or the other. But it is not necessary to make use of the precise words "as to his information and belief;" the defendant may make use of any expressions which are tantamount to them: thus, to say that the defendant cannot answer to facts inquired after, as to his belief *or otherwise*, is generally considered a sufficient denial; for although the word "information" is not used, the expression "belief or otherwise," is held to include it.³

§ 679. If, from an examination of the answer, it sufficiently appear what facts must be taken to be stated under the positive form, by some of the defendants, and

¹ Story's Eq. Pl. § 852.

² Equity Rules, xxxviii. p. 125.

³ 2 Dan. Ch. Pr. 831; *Bradford v. Geiss*, 4 W. C. C. 513; *Dinsmoor v. Hazelton*, 2 Foster, (N. H.) 535.

what, by some of them on the information of others, it will be sufficient. Where the answer is a simple admission of facts, it is totally unimportant on what grounds the defendants have seen fit to make the admissions. And when two of the defendants are charged with having done a particular act, with a particular intention, and all the defendants unite in saying that the act was not done, or was not done with that intention, *reddens singula singulis*, it must be taken as the positive denial of those directly charged, supported by the belief of the others. A man who swears that he believes a thing to be true, which he knows to be false, is guilty of perjury, legal as well as moral.¹ It may be observed here, that where defendants have in their power the means of acquiring the information necessary to enable them to give the discovery called for, they are bound to make use of such means, whatever pains or trouble it may cost them.²

§ 680. With respect to the discovery and production of documents and papers called for by the bill, the rule is thus clearly stated by Mr. Justice Story, "The plaintiff is not entitled, as a matter of right, to the discovery and production of any documents or papers called for by the bill, except those which appertain to his own case, or the title made by his bill; documents and papers which wholly and solely respect the defendant's title or defence, he is not compellable by his answer to discover, or to produce."³

§ 681. When, however, the defendant does answer, and refers to documents in his answer, the rule as to the production of them for the inspection of the plaintiff, upon motion, is thus stated by the same learned commentator,

¹ Gray v. Sutton, District Court, Phila., 31 March 1855. MS.

² 2 Dan. Ch. Pr. 832.

³ Story's Eq. Pl. § 858.

“The question may arise under three different aspects of the answer: 1. The documents and papers may not be referred to in the answer; but they may be admitted to be in the defendant’s possession: 2. They may be referred to in the answer, and not admitted to be in the defendant’s possession: 3. They may be in part set forth, or shortly stated in the answer, as in the defendant’s possession, and referred to in the answer for greater certainty, when produced; or according to the common form, ‘as will appear by the said documents and papers to which, for greater certainty, the defendant craves leave to refer.’ In the first case, the question, whether the defendant shall produce the documents and papers, or not, is determined by considering whether they do, or do not relate to the plaintiff’s title. In the second case, the court cannot order their production, unless they respect the plaintiff’s title; and although not in the possession of the defendant, are evidently under his control. In the third case, it seems, that although the documents and papers solely respect the defendant’s title, yet the court will require their production; for the defendant has, by his mode of referring to them, made them a part of his answer.”¹

§ 682. Where a bill is amended after answer filed, the defendant must put in a new or supplemental answer within twenty days after the amendment or amended bill is filed, and notice thereof given to him, unless the time therefor be enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of omission to put in an answer to an original bill.² In answering an amended bill, the defendant, if he have answered the original bill, should answer

¹ Story’s Eq. Pl. § 859.

² Equity Rules, xliv. p. 127.

those matters which have been introduced by the amendments only. In fact, the answer to an amended bill constitutes, together with the answer to the original bill, but one record; and therefore it is impertinent to repeat in the answer to the amended bill what appears upon the answer to the original bill, unless by the repetition the defence be materially varied.¹

§ 683. Two or more persons may join in the same answer, and where their interests are the same, and they appear by the same solicitor, they ought to do so, unless some good reason exist for their answering separately.² Where two defendants answer jointly, and one speaks positively for himself, the other may, in cases where he is not charged with anything upon his own knowledge, say, that he has perused the answer and believes it to be true; but it is otherwise where the defendants answer separately.³

§ 684. An answer is headed by a title, "The answer of A. B. the defendant to the bill of complaint of C. D. complainant." If two or more defendants join in the same answer, it is intituled "the joint and several answer," &c., unless it be the answer of a man and his wife, in which case it is called "the joint answer." The answer of an infant, or other person answering by guardian, or of an idiot or lunatic by his committee, is so intituled.⁴ And when there is a plea or demurrer to a part of the bill, which is accompanied by an answer to the remainder, it should be intituled, "the demurrer (or plea) of A. B., &c., to part of the bill of complaint of C. D. and the answer of the said A. B. to the remainder of the said bill of complaint." Where, however, the answer is

¹ 2 Dan. Ch. Pr. 839-40.

³ Ibid. 841.

² Ibid. 840.

⁴ Ibid. 841.

merely in support of the plea, they form but one defence, and the title is properly a "plea and answer."¹

§ 685. An answer usually begins by a reservation to the defendant of all advantage which may be taken by exception to the bill, a form which is conjectured to have been intended to prevent a conclusion, that the defendant having submitted to answer the bill, admitted every thing which by his answer he did not expressly controvert, especially such matters as he might have objected to by demurrer or plea. The answer to the several matters contained in the bill, together with such additional matter as may be necessary for the defendant to show to the court, either to qualify or add to the case made by the bill, or to state a new case on his own behalf, next follow. And it is the universal practice to add by way of conclusion a general traverse or denial of all the matters in the bill. This is said to have obtained when the practice was for the defendant merely to set forth his case, without answering every clause in the bill. Though, perhaps, rather impertinent if the bill be otherwise fully answered, and it has been determined to be in that case unnecessary, it is still continued in practice.²

§ 686. An answer must be signed by counsel; and also by the defendant or defendants putting it in, unless an order has been obtained to take it without signature. And all answers, except those of corporations, which are put in under their common seal, must be upon the oath or affirmation of the parties; unless the plaintiff choose to dispense with it.³ The form of the affidavit, annexed

¹ 2 Dan. Ch. Pr. 924-5.

² Mitf. Eq. Pl. 313-14.

³ 2 Dan. Ch. Pr. 843-4; Story's Eq. Pl. § 874. An answer, not on oath, is not evidence in favour of the defendant. *Brown v. Blydenburgh*, 3 Seld. 146. But it is the right of a defendant to make his answer under oath, although an

by the defendant to the answer is—"that what is contained in his answer, as far as concerns his own act and deed, is true to his own knowledge, and that what relates to the act and deed of any other person, he believes to be true."

§ 687. A defendant may swear to his answer before any justice or judge of the courts of the United States, or before any commissioner appointed by any court to take testimony or depositions, or before any master in chancery appointed by any court, or before any judge of any court of a state or territory, or before any justice of the peace or alderman within this commonwealth.¹ And the party may, in all cases, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.²

§ 688. If an answer admit the facts stated in the bill, or such as are material to the plaintiff's case, and state no new facts, or such only as the plaintiff is willing to admit, no further pleading is necessary,³ and the plaintiff may set the cause down for hearing upon bill and answer. Under such circumstances, the plaintiff admits the answer to be true in all points, and no other evidence is admitted, unless it be matters of record to which the answer refers. All the averments in the answer are to be taken as true; and even where the defendant states, he hopes to be able to prove such and such matters, they must be considered as proved, as the plaintiff, by not replying, has precluded the defendant from the opportunity of proving his averments. The effect of a plaintiff setting down a cause for hearing on bill and answer, would seem

answer under oath be waived by the bill. *Holbrook v. Black*, 8 Boston Law Rep. (N. S.) 89.

¹ Equity Rules, lvii. p. 132.

² *Ibid.* lxxxv. p. 146.

³ *Mitf. Eq.* Pl. 15.

to be analogous to a common law demurrer to evidence; where the party tendering the demurrer not only concedes the correctness of the testimony as given, but admits every reasonable conclusion, a jury might fairly draw from such testimony.¹ If, however, the answer do not admit all the facts in the bill material to the plaintiff's case, or state any fact which the plaintiff is not disposed to admit, the truth of the answer, or any part of it, may be denied, and the sufficiency of the bill to ground the plaintiff's title to the relief he prays may be asserted by a replication, which in this case also concludes the pleading according to the present practice of the court.²

¹ *Lanning v. Smith*, 1 Pars. 17; *Peirce v. West's Executors*, 1 P. C. C. 351; *Robinson v. Cathcart*, 4 Cr. C. C. 600.

² *Mitf. Eq. Pl.* 15-16.

CHAPTER VIII.

EXCEPTIONS TO ANSWERS.

§ 689. AFTER the answer is put in, if the plaintiff find that it contains scandalous or impertinent matter, or that it does not sufficiently answer the allegations and charges in the bill, he must file exceptions to it. Exceptions are allegations in writing, stating the particular points or matters with respect to which the plaintiff considers the answer scandalous or impertinent, or those parts of the bill to which he thinks there is not sufficient answer given.¹ The nature of scandal and impertinence in pleading has been already considered,² and it is only necessary here to add, that the same rules which are laid down for distinguishing scandal or impertinence, when comprised in a bill, apply to pleadings in general, and consequently to answers. The practice of the court, also, with regard to exceptions to answers on account of scandal or impertinence, is the same, *mutatis mutandis*, as that already described with respect to exceptions to bills on the same grounds.³

§ 690. If a plaintiff wish to refer an answer for insufficiency, as well as for impertinence, he must procure the reference for impertinence first; for it has been decided, that a reference for impertinence can never be

¹ 2 Dan. Ch. Pr. 72.

² Ante, § 553.

³ Ante, § 554.

contemporaneous with exceptions for insufficiency; and that after a reference for insufficiency, or any other step taken in the cause, an answer cannot be referred for impertinence. And the plaintiff must not only procure the reference for impertinence, but he must obtain the master's report upon it before he obtains an order to refer the answer for insufficiency: if he do otherwise, the reference for insufficiency will be considered a waiver of the reference for impertinence.¹ This is the English practice: in New York, the practice is otherwise, and there, exceptions for scandal or impertinence, and exceptions for insufficiency, are to be taken at the same time.² The question does not appear to have arisen in this state, but the English practice seems to accord best with our equity rules, which require exceptions for scandal or impertinence to be referred to a master, whilst exceptions for insufficiency are to be set down for hearing before a judge.³

§ 691. If a plaintiff conceive an answer to be insufficient, he may take exceptions to it, stating such parts of the bill as he conceives are not answered, and praying that the defendant may, in such respect, put in a full answer to the bill. If, however, the answer be one which accompanies a plea or demurrer to part of the bill, he must, unless he intend to admit the validity of the plea or demurrer, wait till it has been argued; for his exceptions would operate as an admission of its validity. But this rule will not apply to cases where the defendant demurs or pleads to the relief only, and not to the discovery.⁴

¹ 2 Dan. Ch. Pr. 873.

² *Livingston v. Livingston*, 4 Paige, 111; *Woods v. Morrell*, 1 Johns. Ch. 103.

³ Equity Rules, xxv. p. 121; *Ibid.* lx. p. 133.

⁴ 2 Dan. Ch. Pr. 877-8.

§ 692. Exceptions will lie to answers to amended bills, as well as to those put in to original bills; but a plaintiff cannot, in excepting to an answer to an amended bill, object that the defendant has not answered matters which are stated in the original bill; and where a plaintiff takes no exception to the answer to the original bill, he cannot except to the answer to the amended bill upon a ground which would have applied equally to the original bill.¹ The reason of the rule is, that, by amending his bill, the plaintiff has admitted the answer to be sufficient. And upon the same ground it has been held, that where a plaintiff, after excepting to an answer, amends his bill without waiting for the master's report, he will be considered as having waived his exceptions: the principle, however, will not be applied to cases in which the amendment of the bill extends only to the addition of another party, requiring no answer from the other defendants.²

§ 693. After an answer is filed on any rule day, the plaintiff is allowed until the next succeeding rule day to file, in the prothonotary's office, his exceptions thereto for insufficiency, and no longer, unless a longer time be allowed for that purpose, upon cause shown to the court or a judge thereof; and if no exceptions be filed within that period, the answer will be deemed and taken to be sufficient.³ Exceptions to an answer for insufficiency

¹ 2 Dan. Ch. Pr. 879.

² Ibid. 880-1. Whether such technicalities would be allowed to prevail in our practice may well be doubted. In *Kirkpatrick v. M'Donald*, 2 Jones, 393, Mr. Justice Bell observes, that, whilst our tribunals should lean to a liberal exercise of the chancery powers, which the legislature, after a long hesitation, has conferred; they ought not to encourage these "technical niceties in the modes of procedure, and forms of pleading, which have tended rather to retard than to facilitate the object of the jurisdiction."

³ Equity Rules, lix. p. 133.

must be in writing, and care must be taken in framing them that they be properly intituled, otherwise they will be suppressed, or taken off the file for irregularity; thus, where exceptions having been allowed to an answer, the plaintiff obtained the usual order "that he might be at liberty to amend his bill, and that the defendant might answer the amendments and exceptions at the same time," and amended his bill; whereupon the defendant put in a second answer, upon which the plaintiff took exceptions to the second answer, and intituled them "exceptions to the further answer to the original bill, and to the answer to the amended bill;" the exceptions were held to be irregularly intituled, and ordered to be taken off the file; because new exceptions cannot be taken to a further answer to an original bill.¹

§ 694. On exceptions for insufficiency, the particular points or matters in the bill which remain unanswered, or which are imperfectly answered, should be stated in the exceptions.² They are headed with the name of the cause, and intituled "Exceptions taken by the said complainant to the insufficient answer of the said defendant to the said complainant's bill of complaint." They then go on successively, "First, for that the said defendant hath not, to the best and utmost of his knowledge, remembrance, information, and belief, answered and set forth whether, &c.," following the words of the interrogatory which has been insufficiently answered; "Secondly, for that the said defendant hath not, in manner aforesaid, answered and set forth whether, &c.," following the words of the next interrogatory which has been insufficiently answered, and so on throughout; and they then con-

¹ Williams v. Davies, 1 S. & S. 426; 2 Dan. Ch. Pr. 881.

² Stafford v. Brown, 4 Paige, 88.

clude: "In all which particulars the said complainant excepts to the answer of the said defendant, as evasive, imperfect, and insufficient, and humbly prays that the said defendant may be compelled to put in a full and sufficient answer thereto."

§ 695. Where exceptions are filed to an answer for insufficiency, within the period prescribed, if the defendant do not submit to answer the same and file an amended answer on the next succeeding rule day, the plaintiff must forthwith order the prothonotary to set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court; and must give notice of such order to the opposite party or his solicitor. And if he do not so set the same down for a hearing, the exceptions will be deemed abandoned, and the answer held to be sufficient; the court, however, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for filing an amended answer, in his discretion, upon such terms as he may deem reasonable.¹

§ 696. In cases of exceptions for impertinence, one exception cannot be partially allowed; and therefore, if part of an exception be good and the rest bad, the whole exception must be overruled. This, however, is not the case with regard to exceptions for insufficiency, which may be allowed in part and overruled as to part.² If, at the hearing, the exceptions be allowed, the defendant is bound to put in a full and complete answer thereto, on the next succeeding rule day, unless the time be enlarged by order of the court; otherwise, the plaintiff will, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed; or, at his election, he may have a writ of attachment to compel the

¹ Equity Rules, lx. p. 133.

² 2 Dan. Ch. Pr. 882.

defendant to make a better answer to the matter of the exceptions; and the defendant, when in custody upon such writ, cannot be discharged therefrom, but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms as the court or judge may direct.¹

§ 697. Exceptions for insufficiency, as well as those for impertinence, must have the signature of counsel.² If defendants answer separately, exceptions must be taken to each answer; and if a joint answer be put in, and one die, exceptions may be taken to the answer as to the survivor only. A plaintiff must take care to deliver his exceptions before he files his replication; for by replying, he admits the answer to be sufficient. In some cases, however, the court will permit a replication to be withdrawn and exceptions to be taken.³ If the defendant, after exceptions allowed or submitted to, put in a further answer, which the plaintiff considers insufficient, the answer may be again heard upon the old exceptions. And if a third answer be adjudged insufficient, the defendant may be examined upon interrogatories as to the points reported insufficient. Although a further answer can only be referred upon the old exceptions, the plaintiff may, if the bill have been amended, deliver new exceptions applying to any part of the amendments which he does not think sufficiently answered; such new exceptions, however, must not extend to any matter in the bill as originally filed.⁴

¹ Equity Rules, lxi. p. 134.

³ Ibid. 883-4.

² 2 Dan. Ch. Pr. 883.

⁴ Ibid. 892-4.

CHAPTER IX.

AMENDMENTS.

§ 698. THE next step in the cause, after the sufficiency of the answer is determined, is the amendment of the plaintiff's bill. When a plaintiff has preferred his bill, and is advised that the same does not contain such material facts, or make all such persons parties as are necessary to enable the court to do complete justice, he may alter it, by inserting new matter subsisting at the time of exhibiting his bill, of which he was not then apprized, or which he did not think necessary to be stated, and may add such persons as shall be deemed necessary parties; or in case the bill shall be found to contain matter not relevant, or no longer necessary to plaintiff's case, or parties that may be dispensed with, the same may be struck out; and the original bill, thus added to or altered, is termed an amended bill. The amendment, however, is in fact esteemed but a continuation of the original bill, and as forming a part of it; for both the original and amended bill constitute but one record.¹

§ 699. A plaintiff cannot introduce facts, by amendment, which have occurred since the filing of the original bill, because as the amendments are held to constitute a part of the same record as the original bill, which can only relate to facts which had occurred at the time

¹ 1 Dan. Ch. Pr. 454.

when it was preferred, the introduction of matters of a posterior date would render the record incongruous. If such matter be introduced by amendment, it is demurrable. When new events, or new matters have occurred since the filing of the original bill, a supplemental bill is the proper mode of bringing them before the court; for, generally, such facts cannot be introduced by way of amendment.¹

§ 700. The plaintiff is at liberty, as a matter of course, to amend his bill in any matters whatsoever, before answer, plea, or demurrer to the bill; but he must, without delay, give the defendant notice of such amendment, and all rules taken by him are suspended until such notice be given.² Before the answer is filed, the plaintiff may amend as often as he sees fit; but after an answer, he is precluded from so doing, until its sufficiency or insufficiency be admitted or determined. If the answer be insufficient, he is remitted to his former right of amending at discretion.³ If any matter alleged in the answer make it necessary for the plaintiff to amend his bill, he may have leave to amend the same, upon motion to the court, or to a judge thereof in vacation.⁴

§ 701. After an answer, or plea, or demurrer, is put in, and before replication, the defendant may, upon motion or petition, obtain an order from any judge of the court, to amend his bill on or before the next succeeding rule day. But after replication filed, the plaintiff will not be permitted to withdraw it and to amend his bill, except upon an order of a judge of the court, upon motion or petition, after due notice to the other party, and upon

¹ *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. 214; 1 Dan. Ch. Pr. 459-60.

² Equity Rules, xxvi. p. 121.

³ Adams' Eq. 346.

⁴ Equity Rules, xliii. p. 127.

proof, by affidavit, that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been introduced into the bill; and upon the plaintiff's submitting to such other terms as may be imposed by the judge, for speeding the cause.¹

§ 702. Great latitude is allowed to a plaintiff in making amendments; thus, where he has set up one contract in his bill, and another contract of a different character is admitted by the answer, or proved by the evidence, the court may grant leave to amend the bill, so as to conform to the case proved; and this, even after a hearing on the bill, answer, and evidence.² But the court will not carry its liberality further, and permit a plaintiff to amend his bill, so that he may continue to insist upon the agreement originally stated, and if he fail in that, to get the benefit of the one admitted by the defendant.³ And it seems, a plaintiff will not be permitted to amend a bill filed for the mere purpose of discovery, by the addition of a prayer for relief; nor to strike out a prayer for relief, so as to convert it into a bill for discovery only.⁴

§ 703. Any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer, making entirely a new defence and contradicting his former answer.⁵ And where an answer or plea has been filed, and the character of the amendment is such as to justify a defence of a totally different character, the plaintiff must pay to the defendant the cost of his answer as between party and party.⁶

¹ Equity Rules, xxvii. p. 121.

² *Bellows v. Stone*, 14 N. Hamp. 175.

³ 1 Dan. Ch. Pr. 463.

⁴ *Ibid.* 463, 466; *Hare on Discovery*, 23-4.

⁵ 1 Dan. Ch. Pr. 468; *Porter v. English*, 7 Leg. Int. 150.

⁶ *Porter v. English*, ut supra.

§ 704. Wherever leave to amend the bill is granted, it is more proper to file an amended bill than to interline the original bill; particularly if some of the defendants have answered. The amended bill should state no more of the original bill than may be necessary to introduce, and to make intelligible, the new matter which should alone constitute the chief subject of the bill. The reasons for this rule are obvious. Not only is the incorporation of the old bill into the amended bill unnecessary, but it increases the costs, and exposes the defendants, particularly those who have answered the original bill, to the trouble of searching out, and separating the old from the new matter, at the peril of having their answer excepted to, if any mistake should happen, and all the matter of the amended bill should not be answered.¹

§ 705. If the plaintiff, who obtains an order to amend his bill, after answer, plea, or demurrer, or after replication, do not file his amendments, or amended bill, as the case may require, in the prothonotary's office, on or before the next succeeding rule day, he will be considered to have abandoned the same, and the cause will proceed as if no application for an amendment had been made.²

§ 706. The right of thus amending, by introducing altered or additional statements, is not absolutely confined to the plaintiff. The defendant may also, under special circumstances, obtain a similar indulgence; but as an answer is put in on oath, the court, for obvious reasons, will not readily suffer alterations to be made.³ After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correct-

¹ *Peirce v. West's Executor*, 3 W. C. C. 354.

² *Equity Rules*, xxviii. p. 122.

³ *Adams' Eq.* 346.

ing a date, or reference to a document, or other small matter, and be re-sworn, at any time before a replication be put in, or the cause be set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it cannot be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court, or a judge thereof, upon motion, and cause shown, after due notice to the adverse party, supported, if required by affidavit; and in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.¹

§ 707. Although the court will, in cases of mistake or other causes of that description, permit a defendant to correct his answer by a supplemental answer, it always does so with great difficulty, where an addition is to be put upon the record prejudicial to the plaintiff; though it will be inclined to yield to the application, if the object be to remove out of the plaintiff's way the effect of a denial, or to give him the benefit of a material admission. The court also requires, that, in making the application, the defendant should state specifically what he wishes to put upon record, in order that it may judge how far his application is reasonable.²

¹ Equity Rules, lviii. p. 132.

² 2 Dan. Ch. Pr. 914-15; *Caster v. Wood*, 1 Bald. 289. "To allow a defendant, as a general practice, to change his answer, after having discovered precisely, from the opinion of the court, and the testimony in the cause, in what manner it may be modified so as to effect his purpose, would certainly be a dangerous mode of proceeding." *Calloway v. Dobson*, 1 Brock. 122.

CHAPTER X.

REPLICATIONS.

§ 708. AFTER the defendant has fully answered, the plaintiff may either amend his bill or file a replication; or he may set the cause down for hearing upon bill and answer; or else he may, if, upon due consideration, he conceive that he shall not be able effectually to prosecute the cause, apply to the court by motion to dismiss his own bill, with costs, either as against all the defendants, or as against such of them as he thinks he can dispense with. This he may do as a matter of course.¹ It is important to the plaintiff, in deciding whether to set down the cause upon bill and answer against a particular defendant, or to reply to his answer, to bear in mind, that in a hearing upon bill and answer, the answer will be taken to be true in every point, because the defendant has been precluded from substantiating it by evidence.²

§ 709. A replication is the plaintiff's answer or reply to the defendant's plea or answer. In chancery, the general replication only is allowed.³ No special replication to any answer will be permitted; but if any matter alleged in the answer make it necessary for the plaintiff to amend his bill, he may obtain leave to do so upon

¹ 2 Dan. Ch. Pr. 927.

² Ibid. 966.

³ *Candee v. Lord*, 2 Comst. 277; *Duponti v. Mussy*, 4 W. C. C. 128.

motion.¹ Whenever the answer of the defendant is not excepted to, or is adjudged or deemed sufficient, and the plaintiff does not apply for leave to amend his bill, he must file the general replication thereto, on or before the next succeeding rule day thereafter, unless he set the cause down for hearing on bill and answer; and in all cases where the general replication is filed, the cause is deemed, to all intents and purposes, at issue, without any rejoinder, or other pleading, on either side.²

§ 710. If the plaintiff omit or refuse to file his replication within the prescribed period, the defendant will be entitled to a rule upon him to reply at the next rule day, under the penalty of having his bill dismissed; and if at the expiration of such rule, the plaintiff shall not have filed his replication, and shall have had ten days' notice, the defendant is entitled to an order, as of course, for a dismissal of the suit; and the suit will thereupon stand dismissed, unless the court, or a judge thereof, shall upon motion, for cause shown, allow a replication to be filed, *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.³

§ 711. The replication is a denial of the defence and a maintenance of the bill. But it does not put in issue immaterial facts stated in the answer. The defendant cannot, by stuffing his answer with irrelevant matter, compel the complainant to except, or lose the benefit of material facts averred by him and admitted by the answer. This would be to enable a party to take advantage of his own bad pleading. In courts of equity, mispleading in matters of form is never allowed to prejudice any party.⁴

¹ Equity Rules, xliii. p. 127.

³ Ibid.

² Ibid. lxii. p. 134.

⁴ Candee v. Lord, 2 Comst. 277.

CHAPTER XI.

EVIDENCE.

§ 712. THE cause being at issue, by the filing of the replication, the next step to be taken by the plaintiff is, to prepare his proof. The defendant also, if he have any case to establish in opposition to that made by the plaintiff, must in like manner prepare to substantiate it by evidence. In order to this, the first consideration with both parties must be the question, What is necessary to be proved? and, having decided upon that, they must then ascertain the manner in which the proof is to be effected.¹

§ 713. The rules of evidence are the same in equity as at law. The maxim *æquitas sequitur legem*, applies emphatically to this branch of the law; that is, to the law of evidence in courts of equity, which is generally identical with the law of evidence in courts of common law; and generally speaking, that is proof or sufficient evidence in one, which would be in the other. In fact, the whole system of evidence in the courts of equity is an engrafting of the rules established amongst English lawyers upon the forms used by the civilians. Accordingly, we find that on several points it had formerly a greater similarity, in substance as well as form, to the civil law, and that the practice has arrived by degrees

¹ 2 Dan. Ch. Pr. 973.

at its present state, in which, in general, every common law decision is considered as a binding authority.¹

§ 714. Each litigant must prove, by legitimate evidence, so many of the facts alleged in his pleadings as are material to the decree asked or resisted, and are not admitted in his suit by his opponent.² And first, we will consider what admissions by the parties will preclude the necessity of proofs.

§ 715. The facts alleged in the bill, where they are alleged positively, and not by way of pretence, are constructive admissions, in favour of the defendant, of the facts so alleged, and therefore need not be proved by other evidence; for whether they be true or not, the plaintiff, by introducing them into his bill, and making them part of the record, precludes himself from afterwards disputing their truth. Sometimes facts are hypothetically introduced into a bill, for the purpose of raising an answer to an anticipated defence, with a species of protest against their being considered as admitted; as “whereas your orator charges, that in case such or such a thing be true, which your orator by no means admits;” in such cases, the matter alleged is not, of course, to be considered as admitted by the bill, but must be the subject of proof.³

§ 716. The plaintiff, of course, cannot read any part of his own bill as evidence in support of his case, unless where it is corroborated by the answer; as where the bill states a deed or will, and the defendant, in his answer, admits the deed or will to have been properly executed, and to be to the tenor and effect set forth in the bill; in such case, the plaintiff, having read the admission from the answer, may read his bill, to show the extent of the

¹ Gresley's Eq. Evidence, 3.

² Adams' Eq. 362.

³ 2 Dan. Ch. Pr. 974.

admission made by the defendant. Where a defendant refers to the document *for greater certainty*, &c., he has a right to insist upon the document itself being read. Where, however, a defendant, by his answer, admits a document set out in the bill to be to that purport or effect set out, &c., but craves leave to refer to it, the plaintiff need not, on that ground, reply to the answer, but may set the cause down for hearing on bill and answer, and obtain an order to prove the document *vivâ voce* at the hearing; provided it be a document that can be read in that manner.¹

§ 717. With respect to admissions made by the answer of the defendant, it is to be observed, that although a plaintiff by his replication denies the truth of the whole of the defendant's answer, he does not thereby preclude himself from reading whatever portion of it he thinks will support his case; except the answer be that of an infant, which can never be read to establish a fact which it is against the infant's interest to admit.² In permitting an answer to a bill praying relief, to be partially read by a plaintiff in support of his case, the practice of courts of equity differs materially from that of courts of law, in which, if the answer of a defendant be offered as evidence against him, the defendant has a right to insist upon the whole being read, in order that, by comparing the several parts with each other, the true meaning and extent of the admissions may be more clearly understood.³

§ 718. It must not, however, be supposed, that in permitting a plaintiff to read a portion only of the defendant's answer in support of his case, a court of equity will allow a plaintiff to read a passage from a defendant's answer, for the purpose of fixing him with an admission,

¹ Ibid. 975.

² Ibid. 977.

³ Parkhurst v. Devine, 11 Leg. Int. 83.

without reading the explanations and qualifications by which the admission may be accompanied, even though such explanations and qualifications be contained in a distinct passage from that offered to be read. The rule is, that where a plaintiff chooses to read a passage from a defendant's answer, he reads all the circumstances stated in the passage. If the passage so read, contain a reference to any other passage, that other passage must be read also.¹

§ 719. With respect to what will be considered such an admission by an answer, as will dispense with the necessity of other proof, it may be stated, that besides those expressions which in words admit the fact alleged to be true, a statement by the defendant that "he believes," or that he has been "informed and believes," that such a fact is true, &c., will be sufficient, unless such statement be coupled by some clause to prevent its being considered as an admission. The rule in equity being, that "what the defendant believes the court will believe."² It may be stated, as a general and almost universal rule, that the answer of one defendant cannot be read for the purpose of affording evidence against another; because there is no issue between the parties, and no opportunity for cross-examination.³

§ 720. Where an answer has been replied to generally, it can in no case be read as evidence on the part of the defendant himself. But although a defendant cannot read his own answer as evidence for himself, he is entitled to benefit by his answer, so far as it amounts to a denial of the plaintiff's case, unless the denial by the answer be contradicted by the evidence of more than one witness; the rule of courts of equity being, that where

¹ Parrish v. Koons, 1 Pars. 97.

² 2 Dan. Ch. Pr. 980.

³ Morris v. Nixon, 1 How. U. S. 119.

the defendant, in express terms, negatives the allegations in the bill, and the evidence of one person only affirms what has been so negatived, then the court will neither make a decree nor send it to a trial at law.¹ A chancellor will make no decree where the respondent swears directly in answer, and in opposition to its allegations. In such cases, there must be another witness, or else corroborating circumstances, to overbear the defendant's answer. Where it is oath against oath they stand in equilibrium.²

§ 721. Where, however, the answer contains facts not responsive to any allegations in the bill, it is not evidence for the defendant; but the facts must be established by him, if material, by independent proof.³ The only reason why the answer of the defendant is considered as evidence in his favour is, that the plaintiff has called upon him to answer as a witness, and is therefore bound to admit his answer, so far as he has called for it, to be *primâ facie* true, and as worthy of credit as the testimony of any other witness. But when the defendant, in his answer, avers a fact respecting which the plaintiff has not required his answer, there is nothing to make that averment evidence for the defendant; and it stands on the same ground as the averments of a defendant at law in the ordinary course of pleading, and must be sustained by evidence *aliunde*.⁴

¹ 2 Dan. Ch. Pr. 983.

² Horton's Appeal, 1 Harris, 71; Brawdy v. Brawdy, 7 Barr, 159; Greenlee v. Greenlee, 10 Harris, 236; Eberly v. Groff, 9 Harris, 256.

³ Eberly v. Groff, 9 Harris, 256; Robinson v. Cathcart, 3 Cr. C. C. 379; Vint v. King, 2 Am. L. R. 747-8; Commonwealth v. Cullen, 1 Harris, 143.

⁴ Robinson v. Cathcart, 2 Cr. C. C. 600. As to the effect of an answer, where it is not required to be put in under oath, see Story's Eq. Pl. § 875 a; Curling v. Townshend, 19 Ves. 628; Union Bank v. Geary, 5 Peters, 110-12;

§ 722. Where the answer is precise, clear, and positive, to the main facts alleged in the bill, the defendant is to be considered as any other witness, and the rule as above stated must prevail. But a preponderance may be given to the testimony of a single witness, in support of the plaintiff's case, by other circumstances detailed in the answer, or by its unreasonable or evasive statements.¹ Small and slight circumstances will turn the scale, so small and slight, that it is impossible not to perceive that equity considers and appreciates the anomalous condition of the respondent. If an answer be contradictory in itself, be "contrary to the known and well-established analogies of social life, or, for the purpose of evidence, demand a departure from moral axioms of belief, it would be unreasonable to give to it the character of such high and imposing verity. Coming from an interested party, it ought to be clear and distinct, consistent with itself, and not at war with well-established facts in the cause."²

§ 723. It is a fundamental maxim both at law and in equity, that no proof can be admitted of any matter which is not noticed in the pleadings. In certain cases, however, evidence of particular facts may be given under general allegations, and in such cases it is not necessary that the particular facts intended to be proved should be stated in the pleadings. The cases in which this exception to the general rule is principally applicable, are those

Smith v. Clarke, 4 Paige, 504; *Tomlinson v. Lindley*, 2 Carter, 569; 2 Dan. Ch. Pr. 848. The better opinion would seem to be, that an answer, not under oath, is not evidence for the defendant; *Brown v. Blydenburgh*, 3 Seld. 146; especially, since it has been decided, that a defendant cannot be deprived of his right to put in his answer under oath, and thereby make it evidence in his favour, by the plaintiff waiving a sworn answer in his bill. *Holbrook v. Black*, 8 Boston Law Rep. (N. S.) 89.

¹ *Jacks v. Nichols*, 1 Seld. 178.

² *Baker v. Williamson*, 4 Barr, 463, 468.

where the character of an individual, or his general behaviour, or quality of mind, comes in question; as where, for example, it is alleged that a man is *non compos*, it is the experience of every day to give particular acts of madness in evidence, and not general evidence only that he is insane.¹ The same thing may be done, where the question of notice is raised in the pleadings by a general allegation or charge; for the question whether the party had notice or not, is a *fact*; and the fact of the defendant having had notice having been put in issue, the mode in which that fact is to be proved is not important to be put upon the record.²

§ 724. It is upon this principle, that documentary evidence, or letters themselves, are not specifically put in issue. In fact, a party may prove his case, by written or parol evidence indifferently, and is under no more restrictions in one case than in another. It is not necessary to put every written document in issue. But according to the English practice, if a letter or document amount to a confession or an admission, it must be put in issue, in order that the party against whom it is to be read should have an opportunity to meet it by evidence or explanation. And this rule is not confined to writings, but applies to every case where the admission or confession of a party is to be made use of against him.³ But Mr. Justice Story has decided, that this rule does not prevail in the American courts. The admissibility of such evidence may be properly subject, under particular circumstances, to the qualification, that if one party should keep back evidence, which the other might explain, and thereby take him by surprise, the court will give no effect to such evidence, without first giving the party to be affected by

¹ 2 Dan. Ch. Pr. 992-3.

² Ibid. 994-5.

³ Ibid. 995-6.

it, an opportunity of controverting it. This course may be a fit one in cases, where otherwise gross injustice may be done: but it is a matter resting in the sound discretion of the court, and not strictly a rule of evidence. And whatever may be the rule of evidence in England on this point, our practice in equity causes, where the evidence is generally open to both parties, rarely can justify, if, indeed, it ever should require the introduction of such a rule.¹

§ 725. Another rule of evidence is, that the substance of the case made by the pleadings must be proved; that is, all the facts alleged upon the pleadings, which are necessary to the case of the party alleging them, and which are not the subject of admissions either in the pleadings or by agreement, must be established by evidence. In the case of a plaintiff, however, it is sufficient to prove so much only of the allegations in the bill as is necessary to entitle him to a decree. Thus, where the suit is for an account, all the evidence necessary to be read at the hearing is, that which proves the defendant to be an accounting party, and then the decree to account follows of course; and any evidence as to the particular items of an account, however useful they may be in a subsequent stage of the cause, would be irrelevant at the original hearing.²

§ 726. The rules which govern the introduction of documentary evidence in courts of equity are, with few exceptions, the same which are applicable to the same subject in courts of law, and may be found by referring to any of the many excellent treatises on the law of evi-

¹ *Jenkins v. Eldridge*, 3 Story, C. C. 284; *Smith v. Burnham*, 2 Sumner, 612; Story's Eq. Pl. § 265 a.

² 2 Dan. Ch. Pr. 996-7; *Porter v. English*, 7 Leg. Int. 150.

dence which have been published. It is only necessary here to observe, that an examination *vivâ voce*, at the hearing, is admitted in certain cases where written instruments, essential to the justice of the cause, have been neglected to be proved before the examiner, or where the plaintiff finding sufficient matter confessed in the defendant's answer to ground a decree upon, proceeds to a hearing of the cause upon bill and answer only. But no exhibit can thus be proved, that requires more than the proof of the execution, or of handwriting, to substantiate it; if it be anything that admits of cross-examination, or that requires any evidence besides that of handwriting, it cannot be received.¹

§ 727. All persons are competent to be witnesses in equity, who are capable of being witnesses in trials at law. Witnesses in chancery are examined either by an examiner, or by commissioners specially appointed for that purpose by commission under the seal of the court. After the cause is at issue the court will appoint an examiner, at the request of either party who may first make application. This examiner will cause such witnesses as either party may name, to come before him, on a reasonable day or days, to be appointed by him, of which he must give notice to the parties; for the enforcing the attendance of which witnesses, either party may have a subpoena or subpoenas, returnable before the examiner, to be enforced by the usual process of contempt.²

§ 728. The examination is conducted by the counsel of the parties, *vivâ voce*, and the answers of the witnesses must be reduced to writing by the examiner, and the questions also, if necessary to the understanding of the answer, or if it be required by either party. The testi-

¹ 2 Dan. Ch. Pr. 1025-6.

² Equity Rules, lxiv. p. 136.

mony of both parties is to be taken before the same examiner, and the defendant will not be compelled to proceed with the taking of his testimony, until the plaintiff has finished, or declared he has none to take; nor will the plaintiff be compelled to proceed with the rebutting testimony, until the defendant have completed the testimony on his part. But the court may, upon special application of either party, upon cause shown, appoint an additional examiner, before whom the party making such application may proceed to take his testimony, notwithstanding the pendency of the proceeding of his adversary before the examiner first named.¹

§ 729. Either party may, on application to the court, obtain an order on his adversary to close the taking of his testimony within three months after notice of such order; and testimony taken after three months' notice of such order will not be allowed to be read in evidence at the hearing of the cause. But the court may, in its discretion, enlarge the time on the application of the party against whom such order may have been granted. And no such order will be granted against a party, whilst by the provisions of the foregoing rule, such party is not bound to begin until his adversary has closed.²

§ 730. An order to take the testimony of ancient, infirm, and going witnesses *de bene esse*, before any alderman or justice of the peace of the respective county, may be entered by either party in the prothonotary's office, of course, at any time after the service of the subpoena, stipulating a reasonable notice to the adverse party. And so of an order for a commission to any place within the state of Pennsylvania, more than forty miles distant from the county seat of the respective county, or to any other

¹ Equity Rules, lxiv. p. 136.

² Ibid. lxv. p. 137.

state or territory, or to foreign parts. But in case of a commission, the interrogatories must be filed in the prothonotary's office at the time, and written notice of this last order, and of the names of the commissioners, must be served on the adverse party, at least fifteen days before the commission issues, in order that he may file cross-interrogatories, or nominate commissioners on his part, if he shall deem it eligible.¹

§ 731. Depositions taken before magistrates in the method above prescribed, will only be allowed to be read in evidence, on the hearing of the cause, in case the same facts shall appear before the examiner appointed to take testimony in the cause after it is at issue, and be certified by him, to excuse the production of such witnesses before him, as are necessary for the introduction of depositions taken *de bene esse* on trials by jury in the same courts; or if taken by commission, before the cause is at issue, it must appear, by affidavit, at the hearing, that the witnesses so examined were aged, infirm, or going out of the country, or that any of them was a single witness to a material fact.²

§ 732. Where witnesses are examined under a commission, the form of the last interrogatory is directed to be in substance as follows: "Do you know, or can you set forth any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."³ It is optional with the party to insert such a general interrogatory or not; but where one is used, it must be in the form prescribed.⁴

¹ Ibid. lxiii. p. 135.

² Ibid.

³ Ibid. lxvii. p. 138.

⁴ 2 Dan. Ch. Pr. 1051.

§ 733. The proper mode of authenticating a written instrument, is by making the following endorsement on the document proved by the witness: "In the supreme court of Pennsylvania, in equity; between J. K. plaintiff, and L. M. defendant. At the execution of a commission for the examination of witnesses in this cause, this paper writing was produced and shown to N. M., a witness sworn and examined, and by him deposed unto, at the time of the examination, on the complainant's (or defendant's) behalf, before us." (Signed by the commissioners.)¹ When a deposition refers to books of account, copies of them at least should be produced, properly authenticated, to entitle the whole deposition to be read.² And to guard against deception, it has ever been held, that although exhibits come in the same envelope with the commission, if they be not identified by marks or references, they ought not to be received.³

§ 734. Upon the return of a commission executed, the same may, at the application of either party, be opened by any one or more of the judges of the court, in term time or vacation, or by the prothonotary; and the prothonotary must give notice to the parties of the return of any commission, and of the filing of depositions taken before any alderman, justice of the peace, or examiner; and the parties must, within ten days after service of such notice upon them respectively, enter exceptions in writing, if they have any, to the form of the interrogatories, or the manner of the execution of the commission, and the taking of the depositions, or be forever precluded from the benefit of such exceptions; which exceptions,

¹ *Petriken v. Collier*, 7 W. & S. 393-4.

² *Christie v. Woods*, 2 Yeates, 213.

³ *Dodge v. Israel*, 4 W. C. C. 323; *Petriken v. Collier*, 7 W. & S. 394.

when so taken, may be put down for hearing, by either party, at the next rule day, giving notice to his adversary thereof.¹

§ 735. If any of the interrogatories be such as the witness is not bound to answer; if, for example, they tend to expose him to a penalty or forfeiture, or involve a breach of professional confidence, he may decline to answer them, stating at the same time, on oath, his reasons for so doing; a proceeding which is somewhat inaccurately termed a demurrer to interrogatories. The examiner or commissioner takes down the statement in writing, and the objection is heard and decided by the court. If the witness himself do not object to the question, and its impropriety depend on general grounds, and not on such as are personal to himself, as where it involves a breach of professional confidence, or where the interrogatories are leading, or the depositions scandalous, or where any serious irregularity has occurred in taking them, the court, on hearing of the exceptions, will suppress the depositions.²

¹ Equity Rules, lxvi. p. 138.

² Adams' Eq. 370.

CHAPTER XII.

HEARING AND DECREE.

§ 736. THE evidence having been taken and filed, the next step in the cause is, to set it down for a hearing. This may be done by either party, by giving to the prothonotary an order in writing to place it on the argument list. In Philadelphia, no case in equity can be put on the argument list, unless the party desiring it shall in writing require the prothonotary to do so, three days before the calling of the list; and to be entitled to have such case argued, it is also the duty of the party desiring it to give three days' notice in writing to the opposite party that the cause is set down for argument.¹

§ 737. We have already seen, that where the plaintiff sets down a cause for hearing on bill and answer, without a replication, which he always has a right to do, the answer must be taken to be true in all its allegations, whether they be or be not responsive to the allegations in the bill; and the reason is, because the plaintiff, by setting the cause down for hearing on bill and answer, has deprived the defendant of the power of proving them by evidence *aliunde*. The setting down of the cause for hearing on bill and answer is the plaintiff's own voluntary act, and the defendant has no right to ask for a commission to examine witnesses, nor to produce any evidence

¹ Rules of Court, 47.

whatever, other than his own answer. He cannot object to the trial of his cause upon his own representation of it.¹

§ 738. When a cause is reached in its order on the argument list, whether on bill, answer, and proofs, or on bill and answer only, the solicitors of the respective parties must deliver to each of the judges, previous to the argument, a paper book, setting forth the substance of the case, an abstract of the pleadings, and the points to be discussed; and after argument by counsel the court will proceed to a decree. A decree is said to be the sentence, or order of the court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit, according to equity and good conscience.²

§ 739. A decree is either interlocutory or final: an interlocutory decree is where the consideration of the particular question to be determined, or of further directions generally, is reserved till a further hearing; and the further hearing is termed a hearing upon further directions, or upon the equity reserved. It very seldom happens that a first decree can be final, or conclude the cause. Thus, if any matter of fact be strongly controverted, the court is so sensible of the deficiency of trial by written evidence, that it will not bind the parties thereby, but will direct the matter to be tried by a jury. This is effected by means of a feigned issue; or by directing an action at law, to be determined in the ordinary course.³ So also, there are some cases in which it is a rule of the court not to make any decree whatever, till certain preliminary inquiries have been made by one of the masters of the court. A reference to the master is

¹ Robinson v. Cathcart, 2 Cr. C. C. 600-1.

² 2 Dan. Ch. Pr. 1192.

³ Ibid.; Adams' Eq. 375.

generally made for one of the three following purposes, namely, the protection of absent parties against the possible neglect or malfeasance of the litigants; the more effectual working out of details which the judges sitting in court are unable to investigate; and the supplying defects or failures in evidence.¹

§ 740. When a decree does not reserve the consideration of the points of equity, arising upon the determination of the legal rights of the parties, or of the further directions consequent upon the master's report, or the costs of the suit, it is said to be a final decree, and may be pleaded in bar to any new bill for the same matter. Of this nature is a decree dismissing the plaintiff's bill, which, as we have seen, may be pleaded in bar to a new suit, unless accompanied with a direction that the dismissal is to be without prejudice to the plaintiff's right to file another bill.² There are, however, many cases of decrees which, although final in their nature, require the confirmation of a further order of the court, before they can be acted upon: of this nature are decrees in suits against infants, in which a day is given to the infant to show cause against it, after he attains twenty-one; and of the same description are decrees *pro confesso*.³

§ 741. A decree *pro confesso* will be deemed absolute, unless the court shall, within three months after the service of notice of such decree on the defendant, set aside the same, and give the defendant time for filing an answer, upon cause shown. And no such motion will be granted, unless the defendant will undertake to file his answer within such time as the court shall direct; and submit

¹ Adams' Eq. 379.

² 2 Dan. Ch. Pr. 1199.

³ Ibid. 1203; Rogers v. Smith, 4 Barr, 100-1.

to such other terms as shall be imposed on him for the purpose of speeding the cause.¹

§ 742. The court having given its decision in the cause, the decree is to be drawn up by the solicitor of the party in whose favour it is, who must serve a copy thereof upon the solicitor of the adverse party, with notice of the time, which shall not be less than three days thereafter, when the same will be submitted to the court. If the opposite party shall not deem such draft of decree in conformity with the intentions of the court, he may file exceptions before the day of hearing designated in the notice, which must be submitted with the draft of the decree on the day so fixed; and thereupon, the court approving of the draft, or correcting the same, the prothonotary will enter it in his equity docket, and thenceforth it becomes the act and decree of the court.²

§ 743. In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of the master, nor any other prior proceeding, are to be recited or stated in the decree or order; but the decree or order must begin, in substance, as follows: "This cause came on to be heard, (or to be further heard, as the case may be) at this term, and was argued by counsel; and therefore, upon consideration thereof, it was ordered, adjudged, and decreed, as follows, viz.:" (here insert the decree or order.)³ Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may be corrected by order of the court, or of a judge thereof, upon petition, without the form or expense of a rehearing.⁴

§ 744. If the decree be merely for the payment of

¹ Equity Rules, xviii. p. 118.

³ Ibid. lxxviii. p. 143.

² Ibid. lxxix. p. 144.

⁴ Ibid. lxxvii. p. 143.

money, the party in whose favour it is made, is entitled to have a minute thereof (without waiting for the draft of a more formal decree) entered into the equity docket, and placed, in the usual form of entering judgments, in the judgment index of the common law side of the court.¹ If the decree be for the performance of any specific act, as, for example, the execution of a conveyance of land, or the delivering up of deeds or other documents, the decree must, in all cases, prescribe the time within which the act is to be done, of which the defendant will be bound, without further service, to take notice.² The courts which are invested with equitable jurisdiction, being by their constitution courts of record, their decrees have the same effect, as to lien, &c., as judgments at common law.³

¹ Equity Rules, lxxx. p. 144.

² Ibid. viii. p. 114.

³ See Purd. Dig. 461.

CHAPTER XIII.

EXECUTION.

§ 745. WE will now proceed to consider the manner of compelling obedience to a decree. The power of courts of equity for this purpose, like that for compelling appearance on answer, was originally confined to process of contempt. The only difference being that an attachment for non-performance of a decree was not, like an attachment on mesne process, a bailable writ.¹ But it is now provided, that final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the same court, in suits at common law, in actions of assumpsit.²

§ 746. In such cases, the plaintiff may issue a writ of *fieri facias* to levy on the real or personal estate of the defendant; and if real estate be levied on, a writ of *venditioni exponas* may be issued to sell the same. Writs of *testatum fieri facias* and *venditioni exponas* may likewise be issued, as also writs of attachment in execution, to enforce the decree of a court of equity; the proceedings on which are the same as on a common law execution, and which will be found at large in Troubat and Haly's Practice of the Courts of Pennsylvania.

§ 747. In the case of a corporation, if the writ of execution be returned unsatisfied, in whole or in part, the

¹ Adams' Eq. 393; 2 Dan. Ch. Pr. 1244.

² Equity Rules, viii. p. 114.

court, upon the bill or petition of the plaintiff, may issue a writ of sequestration to sequester the goods, chattels, and credits, rents, issues, and profits, tolls and receipts, from any road, canal, bridge, or other work, property, or estate of such corporation. Or the court, upon the application of the plaintiff, setting forth that he verily believes that the effects of the corporation are concealed for the purpose of avoiding the payment of its debts, may issue a citation to the president, secretary, treasurer, or other officers and members of the corporation, commanding them to appear and answer such interrogatories as may be put to them touching the effects of the corporation; and the same may be enforced by attachment.¹

§ 748. Although the common law writs of execution may be resorted to for the purpose of compelling obedience to the decree of a court of equity, it is not imperative on the plaintiff to do so, but he may still resort to the process of contempt, in cases in which imprisonment for debt is not forbidden. But it must be borne in mind, that wherever the decree is for the payment of money founded upon a contract, then the body of the defendant cannot be taken in execution, either by process in equity or at common law.²

§ 749. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds, or other documents, the decree, as we have already seen, must, in all cases, prescribe the time within which the act shall be done, of which the defendant is bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the prothonotary's office, that the same

¹ *Purd. Dig.* 170.

² *Ibid.* 28; *Estate of Hugg and Bell*, 2 *Penn. L. J.* 156.

has not been complied with, within the prescribed time, the prothonotary will issue a writ of attachment against the delinquent party; from which, if attached thereon, he will not be discharged, unless upon a full compliance with the decree, and the payment of all costs; or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance of the decree. If the delinquent party cannot be found, a writ of sequestration may issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree.¹

§ 750. The proper course to be pursued by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the plaintiff may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*, and an order for such an examination may be obtained by a party interested, as well where the property consists of personalty, as where it is real estate. When it appears that a party who has been examined *pro interesse suo*, has a plain title to the property, and is not affected by the sequestration, then it is to be discharged against him, with or without costs, as the court shall determine.²

§ 751. When any decree or order is for the delivery of possession, upon proof being made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same will be entitled to a writ of

¹ Equity Rules, ix. p. 114.

² 2 Dan. Ch. Pr. 1268-9, 1273.

assistance from the prothonotary of the court.¹ A writ of assistance is, in ordinary cases, the first and only process for giving possession of land, under the adjudication of the court.² And it is so much a matter of course that the prothonotary may issue it, in the cases prescribed by the rule, without any application to the court.³ It is an incident to the writs of injunction and sequestration, and is issued, whenever it becomes necessary to aid in enforcing either of them.⁴

§ 752. Every person, not being a party in any cause, who has obtained an order, or in whose favour an order has been made, may enforce obedience to such order by the same process as if he were a party to the cause; and so likewise, every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, is liable to the same process for enforcing obedience to such order, as if he were a party.⁵

¹ Equity Rules, ix. p. 114.

² *Valentine v. Teller*, 1 Hopk. 422.

³ *Com. v. Diffenbach*, Nisi Prius, Lewis, J. 5 May 1854, Purd. Dig. 1102.

⁴ *Ibid.*

⁵ Equity Rules, x. p. 115.

CHAPTER XIV.

FEIGNED ISSUES.

§ 753. It has been already stated, that if any matter of fact in question in the cause be strongly controverted, the court will direct it to be tried by a jury; for which purpose it will either direct an action at law to be brought, which is determined in the ordinary course, or it will order a feigned issue to be raised and tried by a jury on the common law side of the court. In the present chapter we will consider the practice in reference to a feigned issue.

§ 754. In chancery, the awarding of a feigned issue is a matter, not of right in the parties, but of discretion in the court, to satisfy its conscience as to doubts concerning the facts of the case. It is the practice and the undeniable jurisdiction of the court to decide on the fact as well as the law, and the awarding of an issue rests in sound discretion. It would be an abuse of that discretion, and the creation of a great and unnecessary expense, to award an issue when the truth of the fact could be sufficiently and satisfactorily ascertained by the court itself.¹ But, if there be contradictory evidence, between persons who are of equal credit, and have had equal opportunities of information, and the evidence be so equally balanced on both sides, that it becomes doubt-

¹ *Baker v. Williamson*, 2 Barr, 119; *Johns v. Erb*, 5 Barr, 237.

ful which scale preponderates, the court will, in general, direct an issue, in order to relieve and ease its own conscience, and to be satisfied, by the verdict of a jury, of the truth or falsehood of the facts controverted; lest, taking upon itself to pronounce decidedly a matter of such uncertainty, it might do injustice to one of the parties by determining against the truth of the fact.¹

§ 755. Being a matter of sound discretion, an issue is under the peculiar control of the chancellor, as appears from all the cases.² When, however, an issue is ordered, it should be framed between the real parties in interest, and should contain a distinct statement of the contested facts to be tried.³ It ought not to be so framed that the evidence of a person who has really no interest, merely because he is a nominal party, should for that reason be excluded; and at the same time, a subsequent assignment for the mere purpose of making the party a witness, will not render competent one who was really interested at the time the issue was awarded.⁴ In a proper case, however, the court, in granting the issue, will make an order that the defendant be at liberty, if he think fit, to examine the plaintiff before the jury; or that both plaintiff and defendant be examined upon the trial of the issue.⁵

§ 756. When an issue is found by the jury, the judge before whom it is tried can give no judgment on the verdict; he can only certify the finding to the court of equity by which it was awarded.⁶ And as the only motive for directing the issue is, to inform the conscience

¹ 2 Dan. Ch. Pr. 1285.

² *Baker v. Williamson*, 2 Barr, 119.

³ *Shulze's Appeal*, 1 Barr, 254; *Pepper v. Bavington*, 9 Leg. Int. 50; *Moatz v. Knox*, 1 Jones, 269.

⁴ *Pepper v. Bavington*, ut supra.

⁵ *Baker v. Williamson*, ut supra.

⁶ *Ibid.*

of the chancellor; unless he be, or ought to be satisfied, by the report made to him of the trial, he very properly sends the issue back to be re-tried;¹ a motion for a new trial, therefore, must be made in the court directing the issue, and not in the court before which it is tried.² But as the judges of our courts, who direct the issue, for the purpose of informing their consciences, also superintend the trial of it; they have the same advantage which the law judge has in England, of hearing the *vivâ voce* examination of the witnesses; of observing their deportment, as well as that of the jury; and of attending to the strictures of the counsel upon the evidence given in their presence. If, under these circumstances, they be satisfied that the verdict is warranted by the evidence, they have no pretext for the exercise of the discretion assumed by an English chancellor, who may grant a new trial, notwithstanding the judge who tried the issue be satisfied with the finding.³

§ 757. In hearing the motion for a new trial, the court will confine itself to the question, whether the verdict of the jury be in conformity with the weight of evidence and the law, on the particular issue submitted; and will not go into the equities arising on the bill and answer.⁴ If, on the trial of an issue, the judge reject evidence that ought to have been received, or receive evidence that ought to have been refused, although in such case a court of law would grant a new trial, yet if, in a court of equity, the court be satisfied that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new

¹ *Harrison v. Rowan*, 4 W. C. C. 37.

² 2 Dan. Ch. Pr. 1306; *Bull v. Towson*, 4 W. & S. 569.

³ *Harrison v. Rowan*, 4 W. C. C. 37. ⁴ *Cohen v. Gratz*, 6 Penn. L. J. 333.

trial merely on such ground. There is this difference between a motion for a new trial in a court of law and in a court of equity: in a court of law, if the jury find the fact, although the judge may think differently, yet it is permitted to stand, for the finding of the fact is the province of the jury; but in chancery, the verdict is something more than the verdict of the jury: it must be such as to satisfy the court that it can make that its own declaration of the fact which the jury have made theirs.¹ A verdict found on such an issue, binds not the conscience of the judge directing it, nor of the appellant court. They are at liberty to disregard it, if, upon all the proofs given in the progress of the cause, they are not satisfied of its correctness.² A chancellor cannot, if he would, surrender his high prerogative and duty of deciding upon facts according to the convictions of his conscience.³

§ 758. Where a court of equity directs a feigned issue, a writ of error will not lie to the proceedings thereon in the court of law; the only mode of reviewing it is by appeal from the final decree.⁴ Where trial by jury is of right, as it is in the case of a contested will, and in certain money cases, the writ of error is also of right; not so in regard to an issue formed for the information of the chancellor, who may, after all, disregard the verdict. It would be not only useless but inconvenient, to have the regularity of the trial inspected by any one else: useless, because he would not be bound by the event; and inconvenient, because it would produce interminable delay.⁵ Notwithstanding, however, these powerful

¹ *Baker v. Williamson*, 2 Barr, 120; 4 Barr, 469; *Hallowell's Appeal*, 8 Harris, 218.

² *Johns v. Erb*, 5 Barr, 237. See *Bank v. Donaldson*, 6 Barr, 186.

³ *Baker v. Williamson*, 4 Barr, 469.

⁴ *Baker v. Williamson*, 2 Barr, 121.

⁵ *Commonwealth v. The Judges*, 4 Barr, 303.

reasons to the contrary, the legislature have, by act of assembly, granted a writ of error in a feigned issue directed by the orphans' court.¹ This act has not taken away the right to examine the whole proceedings, on appeal from the final decree; and is viewed with little favour by the judges.² It has answered no purpose, said Chief Justice Black, but to make our practice anomalous;³ those who desire to vex, harass, and delay their opponents, will probably take both writ of error and appeal; whilst those who wish for justice only, will be content to have the whole subject investigated at once on an appeal.⁴ Where both are taken, and the decree is reversed on the appeal, the only order that can be made on the writ of error is, to set aside the whole proceedings in the common pleas.⁵

§ 759. After the issue has been tried, and the verdict certified to the court of equity, unless a new trial be granted, the cause must be set down for hearing on further directions. And if on examining the evidence, which ought regularly to be certified along with the verdict, the court should be dissatisfied with the result, it may, as we have already seen, decree according to its own convictions, without regarding the opinion of the jury.⁶ Where a feigned issue is directed by a court of law, the costs always abide the event of the verdict, though not mentioned in the rule for the feigned issue; but it is otherwise, where such an issue is sent by a court of equity to be tried in a court of law; for in the latter case no costs are given on the verdict, but the finding is returned to the court of equity, where the costs are in the discretion of the court.⁷

¹ Purd. Dig. 311-12.

³ *Wills v. Hannen*, 10 Harris, 334.

⁵ *Wills v. Hannen*, ut supra.

⁷ *Brightly on Costs*, 240.

² *Hallowell's Appeal*, 8 Harris, 218.

⁴ *Hallowell's Appeal*, ut supra.

⁶ *Hallowell's Appeal*, ut supra.

CHAPTER XV.

MASTER'S OFFICE.

§ 760. WE now proceed to consider the proceedings on a reference to the master. The courts may appoint standing masters in chancery, in their respective jurisdictions, and they may also appoint a master *pro hac vice*, in any particular case,¹ to inquire and report as to the matters in the cause which are properly the subject of such a reference.

§ 761. Whenever a reference of any matter is made to a master to examine and report thereon, the party, at whose instance and for whose benefit the reference is made, must cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; and if he shall omit to do so, the adverse party may forthwith cause proceedings to be had before the master, at the costs of the party procuring the reference.²

§ 762. Upon every such reference, it is the duty of the master, as soon as he reasonably can, after the same is brought before him, to assign a time and place for proceedings in the same, and to give notice thereof to each of the parties or their solicitors. If either party fail to appear at the time and place appointed, the master may proceed *ex parte*, or, in his discretion, adjourn the ex-

¹ Equity Rules, lxxv. p. 141.

² Ibid. lxix. p. 139.

amination and proceedings to a future day, giving notice to the absent party or his solicitor, of such adjournment. It is the duty of the master to proceed with all reasonable diligence in every such reference; and either party may apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report; and to certify to the court or judge the reasons for any delay.¹

§ 763. The master may regulate all the proceedings in every hearing before him, and has full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference;² where, however, a party calls and examines his adversary, on oath, the oath must be taken for true, unless it be clearly disproved.³ The master may also require the production of all books, papers, writings, vouchers, and other documents applicable to the matter referred to him, where, by the principles of courts of chancery, the production of them may be compelled. He may examine, on oath, *vivâ voce*, all witnesses produced by the parties before him; and order the examination of other witnesses to be taken, under a commission to be issued, upon his certificate, by the prothonotary. He may also direct the mode in which the matters requiring evidence shall be proved before him; and, generally, do all other acts and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.⁴ ●

§ 764. All parties accounting before a master must

¹ Equity Rules, lxx. p. 139.

² Ibid. lxxi. p. 140.

³ Light's Appeal, Supreme Court, 18 December 1854. MS.

⁴ Equity Rules, lxxi. p. 140.

bring in their respective accounts, in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in, may examine the accounting party, *vivâ voce*, or upon interrogatories, before the master, or by deposition, as the master shall direct.¹ The account is generally annexed by way of schedule to an affidavit verifying its contents, and if the accounting party do not bring it in within a time to be fixed by the master, a certificate of such default must be obtained, and an application made to the court for an order that the party may bring in his account within four days, or in default, that an attachment may issue against him to answer for the contempt.²

§ 765. On the account being left with the master, the party calling for it, if not satisfied, may examine the accounting party on oath, under the direction of the master. The account having been thus taken, and the party, if necessary, examined, a charge must then be carried in by the party conducting the inquiry. This charge is usually a transcript of so much of the debtor and creditor account as sets forth the receipts, to which may be added any additional items with which it is intended to charge the accounting party. If the charge include sums not admitted in the account to have been received, they must be substantiated, either by evidence, or by admissions, in the examination of the party charged, or in his answer, or the schedules thereto. The charge being established, is allowed by the master. The party conducting an account before the master is not limited to one charge. If, after his charge is allowed, he discover other items, with which the accounting party is chargeable, he may either amend his charge, or carry in a fur-

¹ Equity Rules, lxxii. p. 141.

² 2 Dan. Ch. Pr. 1363, 1372, 1419.

ther charge, and this he may do as often as may be necessary.¹

§ 766. When the charge has been allowed, the accounting party must carry in his discharge. This discharge is usually a transcript from the payments he has made, as stated either in his debtor and creditor account, or in his answer or examination, or the schedules attached to them. And if a plaintiff carry in a further charge, or an amended charge, the defendant must have an opportunity of carrying a further discharge, and of explaining his case by evidence. The account is vouched, by the production of the proper vouchers, such as receipts, &c.;² but the accounting party may discharge himself, by his own oath, of small sums under forty shillings, provided they do not in the aggregate exceed a hundred pounds.³

§ 767. All affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.⁴ He is also at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *vivâ voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination must be taken down by the master, or by some other person by his order, and in his presence, if either party require it, in order that the same may be used by the court, if necessary.⁵ Parties having charges on an estate or fund, are, if the estate or fund be sufficient, entitled only to attend on the proceedings brought in by them-

¹ 2 Dan. Ch. Pr. 1420-1.

² Ibid. 1422-3.

³ *Baker v. Williamson*, 4 Barr, 469; *Schenck's Account*, 5 Watts, 86.

⁴ Equity Rules, lxxiii. p. 141.

⁵ Ibid. lxxiv. p. 141.

selves; but if there be a deficient fund, each incumbrancer is entitled to attend on the charges of those incumbrancers who claim a priority over him. The same rule applies to creditors coming in to prove their debts under a decree:¹ each may interpose the bar of the statute of limitation against the claim of another.²

§ 768. The compensation to be allowed to a master in chancery, for his services in any particular cause, will be fixed by the court in its discretion, having regard to all the circumstances of the case; and such compensation must be charged upon and borne by the respective parties in the cause, as the court shall direct. A master will not be allowed to retain his report as security for his compensation; but on its allowance by the court, he will be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he do not pay it within the time prescribed by the court.³

§ 769. The master, having concluded his labour, is to make a report thereon to the court; which may be excepted to by any party in interest. But no exception will be received to the report of a master, unless the party excepting have filed the same with the master by whom the report has been made, whose duty it is, on such exception being filed, to re-examine the subject and amend his report, if, in his opinion, such exceptions be, in whole or in part, well founded. In order to give all parties in interest an opportunity of entering such exceptions, no master is allowed to file his report until ten days after he has notified to the parties his intention so

¹ 2 Dan. Ch. Pr. 1356-7.

² Hoch's Appeal, 9 Harris, 282; Drysdale's Appeal, 2 Harris, 531.

³ Equity Rules, lxx. p. 142.

to do, on a day designated, and given them an opportunity of having access to his report. On the hearing of the question of confirming or setting aside the master's report, the party excepting thereto will be confined to the exception made by him before the master; reserving to the court, however, the power of committing the report again, should justice require it. On the return of the master's final report, on the next succeeding rule day, either party may set down the cause for hearing on the next equity argument list.¹

§ 770. In the court of common pleas of Philadelphia county, it is provided by rule of court, that all reports of masters shall be confirmed on the third Saturday next succeeding the day on which they shall have been respectively filed, unless exceptions be duly taken as above provided.²

¹ Equity Rules, lxxvi. p. 142. See Mengas's Appeal, 7 Harris, 223.

² Ibid.

CHAPTER XVI.

COSTS.

§ 771. As it is the usual practice of the court, where upon the hearing it directs either an issue or a reference to a master, not to give any directions upon the subject of costs till after the issue has been determined, or till the master has made his report, it generally happens that the costs of the suit are taken into consideration at the time when the cause comes on for hearing on further directions, and that on such occasions, as soon as the further directions are disposed of, the court makes such order with regard to the costs as it thinks the justice of the case requires. The giving of costs in equity is, however, entirely discretionary, as well with respect to the period at which the court decides upon them, as with respect to the parties to whom they are given.¹

§ 772. When it is said, that the giving of costs in courts of equity is entirely discretionary, it must not be supposed that these courts are not governed by definite principles in their decisions relative to the costs of proceedings before them: all that is meant by the *dictum* is, that these courts are not, like the ordinary courts, held inflexibly to the rule of giving the costs of the suit to the successful party; but that they will, in awarding costs, take into their consideration the circumstances of the

¹ 3 Dan. Ch. Pr. 1515.

particular case before them, or the situation or conduct of the parties, and exercise their discretion with reference to those points. In exercising this discretion, however, courts of equity are generally governed by certain fixed principles which they have adopted upon the subject of costs, and do not, as is frequently supposed, act upon the mere caprice of the judge before whom the cause happens to be tried.¹

§ 773. The authority to tax costs, according to the exigency of each case, or to a general rule, has always been an element of chancery jurisdiction, and it is not withheld from our courts, in chancery cases. Until the establishment of a fee-bill, costs are necessarily a matter of discretion, and to be taxed with the aid of the analogies of our costs at common law.² The acts of assembly authorizing the use of chancery forms of remedy, give to our courts all the power and jurisdiction of courts of chancery in the appropriate cases: part of that power is to fix the costs which shall be paid by the parties at any stage of the proceeding. Originally, all costs were fixed for each case as it arose; but in the course of time, it was found more just and convenient to have them regulated as far as possible by fixed standards; and hence arose fee-bills, established by the courts; and with us, more properly by the legislature. But no fee-bill ever attempted to fix every item of costs to which one party should be entitled, as against another: their principal object is to fix the amount of fees which *officers* of the court may demand of the parties.³

§ 774. That it was not intended that the costs in chancery proceedings should be restricted by the common law

¹ Ibid. 1516.

² Neel v. Neel, Sup. Court, 12 December 1854. MS.

³ Porter v. English, 7 Leg. Int. 150.

fee-bill, is apparent from three different acts of assembly; one relating to a bill of discovery in aid of an execution, wherein the costs are declared to be in the discretion of the court;¹ and the others requiring the court of nisi prius and the district court of Allegheny county, to fix a standard of fees for chancery cases.² These last acts are evidently not acts conferring a power as to costs; but requiring that power to be exercised according to a fixed rule to be adopted by the courts: an antecedent power is recognised, and the duty of exercising it in a particular mode enjoined. It is therefore beyond doubt, that in awarding costs as between party and party, in chancery proceedings, the courts are not restricted by the items specified in the common law fee-bill.³

§ 775. We here purpose to consider only such costs as are technically termed "costs in the cause," and not those which merely regard interlocutory proceedings. It may be observed, however, that with respect to the costs of interlocutory proceedings, certain rules exist with regard to their being or not being costs in the cause, and that those costs which do not come within the definition of "costs in the cause," under these rules, cannot be obtained as such without the special direction of the court. These rules are as follows: 1. That the party making a successful motion is entitled to his costs as "costs in the cause;" but the party opposing it is not entitled to his costs as "costs in the cause:" 2. That the party making a motion which fails, is not entitled to his costs as "costs in the cause;" but the party opposing it is entitled to his costs as "costs in the cause:" 3. That where a motion is made by one party and not opposed by the other, the costs of both parties are "costs in the cause."⁴

¹ Purd. Dig. 310.

² Ibid. 308, 1070.

³ Porter v. English, 7 Leg. Int. 150.

⁴ 3 Dan. Ch. Pr. 1517-18.

§ 776. It was the rule of the civil law, that *victus victori in expensis condemnatus est*, and this is the general rule adopted in courts of equity, as well as in courts of law, at least to the extent of throwing it upon the failing party to show the existence of circumstances to displace the *primâ facie* claim to costs given by success to the party who prevails. If, however, the failing party can show to the court any circumstances which may satisfy it, that it would be against the ordinary principles of justice that he should pay the costs of the proceeding, he will be permitted to do so; and the court will even, under certain circumstances, not only excuse the unsuccessful party from the payment of costs to his opponent, but will actually throw his costs upon the party succeeding: cases of the latter kind, however, are very limited.¹

§ 777. The general rule, which gives the costs of the suit to the victorious party, and throws them upon the unsuccessful party, applies equally to cases in which the parties are suing or defending in *autre droit*, and to those in which they are *sui juris*. Therefore executors, administrators, or trustees, instituting or defending suits against strangers to their trusts in those capacities, are subject to the same rules, as to costs, as they would be if they were suing or defending in their own rights. The question, whether a party who sues or defends in *autre droit* and is unsuccessful, shall be reimbursed his costs out of the estate which he represents, or in respect of which he is a trustee, is a totally distinct one, and will be hereafter considered.²

§ 778. In coming to a decision upon the subject of costs, the court is frequently governed by its wish to discourage unnecessary litigation. Thus, where it appeared

¹ Ibid. 1520-1; *Snyder v. Wolfley*, 8 S. & R. 332. ² 3 Dan. Ch. Pr. 1521.

that the defendants had written to the plaintiffs a letter, offering terms which would have rendered the suit unnecessary, the court, although the plaintiffs were entitled to part at least of the relief prayed, refused to give them the costs of the cause; holding, that it was incumbent on them, before going on with their suit, to put it to the test whether the defendants were sincere in their offer.¹ But unless the offer of the defendants extend to every thing which the plaintiff has a right to demand, whether in the nature of relief or of costs, the court will not punish the plaintiff for declining the offer, by refusing him his costs.²

§ 779. A tender to be effective must be of the whole sum due, and of the costs, if any have been incurred; and if a tender be refused, and it afterwards appear that the sum actually due exceeds the amount tendered, the defendant will not be exempted from costs. A tender must also be specific, and although it may be of a larger sum than is actually due, yet if such tender be coupled with a direction to the plaintiff to take out of it such a sum as is actually due to him, it will not be good. So also, if the tender be clogged with conditions, which the party has no right to impose, it will not be effective to excuse the party making it from the costs.³

§ 780. The court regards, in some respects, the granting of costs to a party, somewhat in the light of a testimonial of good conduct; and will generally withhold such testimonial from a party who has been guilty of any misconduct with reference to the subject of the suit. So, where a plaintiff has slept upon his rights for a great number of years, and has allowed the defendant to sup-

¹ *Millington v. Fox*, 3 M. & C. 352.

² 3 Dan. Ch. Pr. 1534.

³ *Ibid.* 1535.

pose that he would not enforce them, he will frequently, though successful, be deprived of his costs. In cases also where one party, upon the construction of a doubtful point of law, has obtained a great advantage over the other, the court will not give him his costs.¹ So also where the plaintiff ought to tender to the defendant an indemnity before bringing suit, a court of equity, having a discretionary power over the costs, even so far as to fix them on the successful party, may dispense with a tender before bill filed, because complete justice may be done by prescribing it at any time, as the terms of relief.² And although a court of equity allows a bill to be filed by a vendor before he is in a situation to convey, holding it sufficient if he can make himself so by the time of the decree; yet, by its absolute control over the costs, and by its power to impose terms and enforce orders adapted to every variety of aspect the case may assume, it may do complete justice between the parties.³

§ 781. We have seen, that where the unsuccessful party has done all in his power to prevent litigation, either by making a tender, or taking some other step of that nature, the court will not compel him to pay the costs of a suit which he has endeavoured to avoid; still the court is not so unreasonable as to expect him, for the purpose of avoiding litigation, to relinquish any right he may fairly be supposed to have; and it will, therefore, if it appear that a party, in resisting or asserting a claim, had *probabilem causam litigandi*, excuse such party from payment of costs, although the ultimate decision of the court may be against him.⁴ It is upon this principle, that where an executor or administrator commences a suit in

¹ Ibid. 1537, 1539, 1540.

² Snyder v. Wolfley, 8 S. & R. 332.

³ Magaw v. Lothrop, 4 W. & S. 321.

⁴ 3 Dan. Ch. Pr. 1541.

chancery, in good faith, upon probable grounds of right, and to enforce a supposed claim of the testator or intestate, he will not be charged with costs.¹

§ 782. In deciding the question of costs, the court will frequently apportion them, so as to cause the costs of one part of the suit to fall upon one party, and those relating to another part upon the other party; thus, where a plaintiff claims several matters by his bill, and succeeds in establishing his right to a portion only of what he so claims, the court will sometimes grant him a decree for that part of his case in which he is successful, with costs to be paid by the defendant, and dismiss the remainder of his bill, with costs to be paid by himself. So also, where there are several issues, and some are found for the plaintiff and others for the defendant, the parties will be allowed costs on issues found in their favour, and must pay on those against them. Sometimes, where no part of the bill is dismissed, but a decree is made upon the whole of it, the court will order the costs of the suit, up to a certain period, to be borne by one party, and the remainder by another; thus, in suits for a specific performance, where a vendor does not make out his title until after the bill is filed, he will be liable to pay the costs of the suit, up to the time when he showed a good title.²

§ 783. Where the costs are apportioned between the plaintiffs and the defendants, the court will generally so arrange them, that they may be set off one against the other, and that the balance only shall be paid by the party from whom, upon setting off such costs, it shall appear to be due. The court will also, where there are

¹ *Murray v. Philips*, 1 Paige, 472; *Furnis v. Ewing*, 5 Penn. L. J. 507.

² 3 Dan. Ch. Pr. 1549-50.

sums of money to be paid as well as costs, arrange the demands of each so as to do justice to all.¹ An application for a set-off under such circumstances, does not come within the provisions of the defalcation act, but depends on the general jurisdiction of the court over its suitors; and courts of equity, accordingly, exercised jurisdiction for the purpose of effecting this end in cases of cross-demands, before any statutory provision was made authorizing the courts of common law to interpose their authority for a like purpose.² Such right, however, is only permitted where it will infringe on no other right of equal grade.³

§ 784. We will now proceed to the consideration of those cases, in which an estate, whether real or personal, being the subject of litigation, the court will order the costs of the suit, or those of some of the parties to it, to be defrayed out of the fund or estate. It is a rule, that trustees, agents, and receivers, accounting fairly, and paying their money into court, are entitled to their costs out of the estate, as a matter of course; and the same rule extends to personal representatives,⁴ who are not chargeable with the expenses of legal proceedings, if they have been carried on *bonâ fide*, in the performance of their duties.⁵ Their right to costs out of the fund depends, however, altogether upon whether the litigation be for the benefit of the estate, or in the promotion of the interests of those eventually found entitled to the fund.⁶

§ 785. Where an executor or administrator carries on a vexatious litigation for his own exclusive benefit, he is

¹ Ibid. 1550-1.

² Coates's Appeal, 7 W. & S. 102.

³ Ramsey's Appeal, 2 Watts, 230.

⁴ 3 Dan. Ch. Pr. 1554.

⁵ Oakford's Estate, 1 Wh. Dig. 1092, pl. 418.

⁶ Royer's Appeal, 1 Harris, 572; Scott's Estate, 9 W. & S. 98.

not entitled to charge the estate with the costs of it;¹ nor where he has made an unjust and vexatious defence to the claim of the next of kin;² nor where, with assets in his hands, he has, without reason, resisted the payment of a just debt.³ In all cases in which executors and others acting in a representative capacity, have been guilty of fraud or misconduct, the costs will be put upon them, and not upon the trust fund.⁴

§ 786. The defendant in a bill for discovery merely is entitled to his costs, as soon as he answers, and the time for excepting has expired.⁵ It is the general practice, that a plaintiff who comes into equity for discovery and obtains it, shall pay the costs. But a defendant who has been previously applied to for the information sought by the bill, and has improperly refused to give it, is not entitled to costs, though he make the discovery when sought by the bill.⁶ Where the defendant in a bill of discovery is entitled to costs, he may move for them as soon as the answer is perfected.⁷ And in the case of a bill to perpetuate testimony, the defendant may move, as of course, for his costs, as soon as the witnesses have been examined, or the commission executed, upon the allegation that he did not examine any witnesses.⁸

¹ *Wither's Appeal*, 1 Harris, 582; *Hartzell v. Brown's Heirs*, 5 Binn. 138.

² *Gossner's Estate*, 6 Wh. 401.

³ *Armstrong's Estate*, 6 Watts, 236.

⁴ *Harlan's Estate*, 3 Penn. L. J. 116; *Show v. Conway*, 7 Barr, 136-7.

⁵ 3 Dan. Ch. Pr. 1600; *Peebles v. Baggs*, 1 T. & H. Pr. 81.

⁶ *King v. Clark*, 3 Paige, 76.

⁷ *Ibid.*

⁸ 3 Dan. Ch. Pr. 1601.

CHAPTER XVII.

REHEARINGS.

§ 787. WHERE a party feels himself aggrieved by a decree of the court, there are three modes by which he may have it either reversed or altered: 1. By a rehearing before the same court: 2. By an appeal to a superior tribunal: 3. By a bill of review. In the present chapter the subject of rehearings will be briefly considered. And here it may be observed, that there is no branch of equity practice in which our courts have more widely departed from the rules adopted by the English court of chancery, than that involving questions of rehearing and appeal; partly in consequence of our statutory regulations, and partly from the almost infinite delays and inconveniences which are the acknowledged results of the English practice. Their decisions, therefore, on these subjects, can be of but little weight in determining an analogous case arising in our own jurisdiction.

§ 788. In England, a rehearing by the Lord Chancellor of a decree made by the master of the rolls, or by a vice-chancellor, is in fact an appeal; and yet, being in point of form but a new hearing before another judge of the same court, it is considered as a rehearing; and in consequence, certain rules have been there adopted on the subject of rehearings, which can have no place where, as with us, a rehearing is strictly speaking, a new hearing of the case before the same court. Thus,

according to their practice, a rehearing, where the application is sanctioned by the application of two counsel, is a matter of course, although a second rehearing will not be permitted unless specially allowed.¹

§ 789. The doctrine of the American courts on this subject is very different; it was fully and ably considered by Mr. Justice Story in *Jenkins v. Eldridge*,² in which he made the following observations:—"But I desire to say a few words on this occasion, as to rehearings of equity causes in this court, upon the original evidence. They have been exceedingly rare in this court, I admit; as, in my judgment, they ought to be, unless some plain and obvious, and palpable error, or omission, or mistake, in something material to the decree, is brought to the notice of the court, which had before escaped its attention. But if a rehearing were to be granted upon the mere certificate of counsel, who had argued the cause, that, in their judgment, the decree was erroneous, (a certificate which, with great sincerity and readiness, would almost always be given by the counsel,) it is obvious, that in the great mass of equity causes of a difficult and important nature, in this court, depending upon conflicting views of law, and also upon conflicting, and often irreconcilable evidence, a rehearing would be almost a matter of course; and considering the vast time occupied in hearing such causes, there would be little time left for the court to devote itself to any other business, and the other suitors in the court would suffer the most oppressive delays, and often the most irremediable injustice.

§ 790. "Besides, it is no small recommendation of our practice, that it thereby requires, in the first instance,

¹ 3 Dan. Ch. Pr. 1919.

² 3 Story, C. C. 299.

on the part of counsel, a thorough examination and preparation for the hearing; and on the part of the court, a most solicitous and exact study of the whole cause, before the judgment is pronounced. The other course would encourage inattention or indifference, and induce counsel, as well as the parties, to speculate upon contingencies, and to argue the cause at large, only when the court had delivered the result of its opinion. On all these accounts, it has been the constant habit of the supreme court of the United States to refuse rehearings of any cause, after it has once pronounced its own judgment, whatever might be the conflicts in the evidence, or the differences among the judges themselves, as to the merits of the controversy.

§ 791. "I am aware of the English practice on this subject. It has guards, which do not, and cannot exist here, where the counsel and the client are brought into immediate and constant contact with each other. But such as is the practice in England, it is a source of almost infinite delays and inconveniences; and under a chancellor like Lord Eldon, whose mental constitution led him to cherish interminable doubts, and to court rehearings, it must be a source of irreparable mischief, and sometimes of unmitigated ruin. I have no desire to introduce such a practice into this court. When a cause has been once fully argued in this court, and an appeal lies from its decree, there is, ordinarily, no reason for a rehearing here upon the original evidence; and if such a practice is to be introduced, it must be by the will and judgment of some one who shall succeed me. If rehearings are to be had, until the counsel on both sides are entirely satisfied, I fear that suits would become immortal, and the decision be postponed indefinitely."¹

¹ See also, *Emerson v. Davies*, 1 Wood. & Min. 21.

§ 792. The grounds upon which a party may apply for a rehearing are as numerous and various as the cases themselves, and any attempt at pointing them out would be hopeless. An application for a rehearing must usually state some reason which would constitute a good ground for a new trial at common law.¹ It is not sufficient to show that injustice has been done; but it must appear that it occurred under circumstances authorizing the court to interfere; it must appear that the petitioner has not been guilty of laches, and that the matter on which he relies could not have been obtained by reasonable diligence at the former hearing.² A petition for a rehearing may be granted at any time, within the discretion of the court; but where the decree has been executed, parties who have acted on the faith of it will not be permitted to be injured by such decree being reversed or varied.³

§ 793. A petition for a rehearing need not state the proceedings in the cause anterior to the decree sought to be reheard;⁴ but it must contain the special matter or cause upon which such rehearing is applied for:⁵ it concludes with a prayer that the cause may be reheard, and either that the decree may be reversed, or that it may be altered in such points as are objected to.⁶ It must be signed by counsel; and the facts therein stated, if not apparent on the record, must be verified by the oath of the party, or of some other person.⁷

§ 794. Upon a rehearing, no evidence can be gone into

¹ *Hunter v. Marlboro*, 2 Wood. & Min. 168.

² *Walsh v. Smith*, 3 Bland, 9; *Prevost v. Gratz*, 1 P. C. C. 379.

³ Equity Rules, lxxxii. p. 145.

⁴ 3 Dan. Ch. Pr. 1622.

⁵ Equity Rules, lxxxii. p. 145.

⁶ 3 Dan. Ch. Pr. 1623.

⁷ Equity Rules, lxxxii. p. 145.

but what was heard, or ought to have been heard, upon the original hearing.¹ But where evidence in the case was omitted to be read at the original hearing, such, for example, as a document, or where the proof of an exhibit in the original cause was omitted, the court will make an order allowing them to be read or proved, saving just exceptions.²

¹ *Jenkins v. Eldredge*, 3 Story, C. C. 299.

² *Scales v. Nichols*, 2 Yerger, 140.

CHAPTER XVIII.

APPEALS.

§ 795. IN treating upon the subject of appeals, it must constantly be borne in mind, that no appeal lies from an interlocutory order or decree, (as it does in England to the House of Lords) but only from the final decree;¹ and that our courts are directed by statute to exercise their equity powers, according to the practice in equity, prescribed or adopted by the supreme court of the United States, unless it be otherwise provided by act of assembly, or the same be altered by the supreme court of this commonwealth by general rules and regulations.² It is to the practice in that high court that we must, therefore, look for a guide, in reference to our own appellant jurisdiction, in cases not provided for by our own rules in equity. And where that is silent, then we may have recourse to the practice of the English court of chancery, not as a positive rule, but as furnishing just analogies to regulate the practice.³

§ 796. Let us in the first place consider, what is a final decree from which an appeal lies to the supreme court. A decree which finally decides and disposes of the whole merits of the cause, and reserves no questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for

¹ *Purd. Dig.* 308-9.

² *Ibid.* 307.

³ *Equity Rules*, lxxxiv. p. 145.

its further decision, is a final decree.¹ Therefore, no appeal lies from a decree for an account;² or for the appointment of a receiver and the issuing of an injunction;³ or from a decree dissolving an injunction;⁴ or from one making an injunction perpetual, and leaving some matters of account open for further consideration, upon which the parties are to take further proof;⁵ or an order dismissing the committee of a lunatic and appointing another in his place.⁶

§ 797. A decree awarding a new trial at law, in an action which the suit in equity is brought to restrain, is an interlocutory decree;⁷ and so is a decree that money shall be paid into court, or that property shall be delivered to a receiver, or be held in trust to be delivered to a new trustee.⁸ And where the court below decreed, that the complainants were entitled to two-sevenths of certain property, and referred it to a master to take and report an account of the property, and reserved all other matters in controversy until the coming in of the report, it was held to be an interlocutory decree.⁹ So, no appeal lies from a decision upon a question of practice addressed to the discretion of the court; as upon a refusal to open a decree *pro confesso*, and permit the defendant to file an answer;¹⁰ or to grant a rehearing.¹¹

¹ *Holden's Administrators v. M'Makin*, 1 Pars. 289; *Wills v. Hoag*, 7 Paige, 18. See *Senseman's Appeal*, 9 Harris, 334; *Hess's Appeal*, 1 Watts, 255.

² *Eckfeldt's Appeal*, 1 Harris, 171.

³ *Holden's Administrators v. M'Makin*, 1 Pars. 289.

⁴ *Young v. Grundy*, 6 Cranch, 51; *Hiriart v. Ballon*, 9 Pet. 156; *Selden v. Vermilya*, 1 Comst. 531.

⁵ *Brown v. Swann*, 9 Pet. 1.

⁶ *Black's Case*, 6 Harris, 434-9.

⁷ *Lea v. Kelly*, 15 Pet. 213.

⁸ *Forgay v. Conrad*, 6 How. U. S. 201.

⁹ *Perkins v. Fourniquet*, 6 How. U. S. 206. And see 1 Curtis's Com. § 187-8.

¹⁰ *Fort v. Bard*, 1 Comst. 43; *Schermerhorn v. Mohawk Bank*, 1 Comst. 125.

¹¹ *Mayor of New York v. Schermerhorn*, 1 Comst. 423; *Marvin v. Seymour*, 1 Comst. 535.

§ 798. It is provided by act of assembly, that any person or body corporate aggrieved by any final order or decree in equity, under the general or special equity powers conferred upon the several district courts and courts of common pleas of this commonwealth, other than those of certain excepted counties, shall be entitled to an appeal to the supreme court, in the same manner, and upon the same terms, as appeals are allowed from the orphans' courts.¹ On an appeal from the orphans' court, it is provided, that the party appealing, shall give security by recognisance, with sufficient surety, in the court below, or before one of the judges thereof, conditioned to prosecute such appeal with effect, and to pay all costs that may be adjudged against him; and shall make oath or affirmation that the appeal is not intended for delay.²

§ 799. An appeal so entered will stay all proceedings in the court below, until the same be determined in the supreme court, and the record remitted to the court below. No appeal, however, will be allowed, unless the same be entered and security given, within three years after the final decree, and no reversal or modification of any decree, or proceedings for the sale of real estate, will have the effect of divesting any estate or interest acquired under such decree or proceedings, by any persons not party thereto, where the court below had jurisdiction of the case. The supreme court is required to hear, try, and determine the merits of such cases, and to decree according to the justice and equity thereof.³

§ 800. On appeals from the decrees of the courts of common pleas of Beaver, Berks, Centre, Clarion, Clin-

¹ Act 21 April 1846, § 3, *Purd. Dig.* 309.

² *Purd. Dig.* 625.

³ *Ibid.* 625.

ton, Crawford, Erie, Forest, Jefferson, Lancaster, Lawrence, Mercer, Philadelphia, Schuylkill, Venango, Warren, Wayne, and York counties, it is necessary for the party appellant, in addition to the foregoing terms and regulations, in order to secure to himself a stay or supersedeas of execution, to comply with the following further terms and conditions, namely:¹

§ 801. I. If an appeal be made from any order or decree of the said courts of common pleas in equity, directing the payment of money, such appeal shall not stay the issuing of execution or other process to enforce the decree, or any proceedings thereon, unless a bond be given by or on behalf of the appellant to the adverse party, in a penalty at least double the sum decreed to be paid, with two sufficient sureties to be approved by the said court of common pleas, or one of the judges thereof, conditioned that if the appellant shall fail to prosecute his appeal, or if the same be dismissed or discontinued, or if the decree appealed from, or any part thereof, be affirmed, then that such appellant will pay and satisfy the amount directed to be paid by such decree, or the part of such amount as to which such decree shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant by the said supreme court upon such appeal.²

§ 802. II. If the decree appealed from direct the assignment or delivery of any securities, evidences of debt, documents, chattels, or things in action, the issuing and execution of process to enforce such decree shall not be stayed by such appeal, unless the articles required to be

¹ Purd. Dig. 309, 306-7, 1070-1, 1125. In Fayette county, an appeal may be taken upon the same conditions and terms as a writ of error is allowed in other cases. Ibid. 307.

² Purd. Dig. 309.

assigned or delivered be brought into court, or placed in the custody of such officers or receivers as the said court of common pleas shall appoint; or unless a bond in a penalty, at least double the value of the articles so directed to be delivered or assigned, be given to the adverse party, with two sufficient sureties, to be approved as aforesaid, conditioned that the appellant will abide and obey the order of the said supreme court, made upon the subject of such appeal.¹

§ 803. III. If the decree appealed from direct the execution of any conveyance or other instrument by any party, the issuing and execution of any process to enforce such decree shall not be stayed by such appeal, until the appellant shall have executed the conveyance or instrument directed, and deposited the same with such officers or receivers as shall be designated by the said court of common pleas.²

§ 804. IV. If the decree or order appealed from direct the sale or delivery of the possession of any real property, the issuing and execution of process to enforce the same shall not be stayed, until a bond be given with sureties as aforesaid, in such penalty as the court of common pleas shall deem sufficient, conditioned that during the possession of such real property by the appellant, he will not commit or suffer any waste to be committed thereon, and in case such appeal be dismissed or discontinued, or such order or decree be affirmed, such appellant will pay the value of the use and occupation of such property, from the time of such appeal, until the delivery of the possession thereof pursuant to such order or decree.³

§ 805. Whenever in the foregoing cases, an appeal is perfected by bringing into court, or depositing, pursuant

¹ Purd. Dig. 309.

² Ibid.

³ Ibid.

to its order, any articles required to be so deposited, or any instruments required to be executed, or by giving a bond as prescribed in the act of assembly, such appeal stays all further proceedings in the court of common pleas upon the order or decree appealed from, and upon the subject matter embraced in such order or decree; but does not prevent the court of common pleas from proceeding upon any other matter included in the bill, and not affected by such order or decree. And whenever the order or decree appealed from, directs the sale of perishable property, notwithstanding any such appeal, and a compliance with the foregoing directions, such property may be sold by final order of the court of common pleas after the taking of such appeal, and the proceeds of such sale will be brought into court to abide the final order and decree of the supreme court.¹

§ 806. At common law, when a levy has been made on a writ of *feri facias*, such an execution is considered executed, and a writ of error is too late to arrest the sale of the goods levied on; but such a sale on a writ of *feri facias*, issued to enforce a decree in equity, would undoubtedly be a proceeding upon the decree appealed from. The evident intention of the act is, that if such appeal be perfected within the period allowed for the appeal, and before the decree be performed, the decree or order shall not be enforced. The process by which decrees are usually enforced in equity, whether attachment or sequestration, cannot be proceeded with after the appeal; the entire proceeding is arrested. The adoption by the court of the writ of *feri facias* as final process to execute decrees for the payment of money, cannot, of course, alter the effect which the law designed to give the

¹ Purd. Dig. 309.

perfected appeal, and where such writ has not been fully executed, before the appeal is perfected, the court can do no act by which the decree may be enforced. An appeal perfected is a supersedeas of such execution.¹

§ 807. The appeal is taken in the court below; the oath and recognisance may be made and taken, either before one of the judges of the court, or before the prothonotary or clerk; the party, his agent, or attorney, may enter into the required affidavit and recognisance; and in case of an appeal by a corporation, the oath or affirmation may be made by the president, or other chief officer, or, in his absence, by the cashier, treasurer, or secretary.² The power of taking bail on the appeal and fixing the amount of security to be given, is vested exclusively in the court below, and is a matter entirely within its judicial discretion.³

§ 808. The appeal having been duly entered in the court below, the next step in the cause is to remove the appeal to the supreme court to be there heard and determined. In the supreme court of the United States, the process for the removal of causes for its revision issues out of the circuit court, and is returnable before the supreme court; but that is not our practice. It would seem, that the English practice would be the more regular, namely, to present in the supreme court a petition of appeal, which is nearly the same in form, *mutatis mutandis*, as a petition for a rehearing;⁴ upon which a writ of *certiorari* will issue to the court below to remove the record. Such writ is generally issued upon a *præcipe* signed by the solicitor of the appellant; but, as no original

¹ *Chillas v. Brett*, 3 Am. L. R. 116-17.

² *Purd. Dig.* 313.

³ *Chew's Case*, 8 W. & S. 375; *Com. v. The Judges of the Orphans' Court*, 10 Barr, 37.

⁴ 3 *Dan. Ch. Pr.* 1636.

process issues out of a court of equity without a bill or petition asking for the relief to which the party considers himself entitled, and as the appellant court can have no judicial knowledge of the entry of the appeal in the court below, until it be brought to its attention by a petition, the latter mode of proceeding would seem to be the most proper. The regular mode of bringing up the record is by *certiorari*;¹ and upon this the original record is to be returned to the supreme court, and not a transcript merely.²

§ 809. The prothonotary is required to endorse on the *certiorari*, a rule to appear and plead at the return day of the writ; and in default of appearance when the cause is called for argument, and proof of ten days' service of notice on the opposite party or his counsel below, the court will proceed *ex parte*.³ An equity suit, where an appeal has been taken to the supreme court but not prosecuted, will be dismissed upon producing a certificate from the court below, that the appeal has been taken and not prosecuted.⁴ When the record has been returned, it is the duty of the appellant's counsel, on or before the third day of the term, to specify the particular errors which he assigns, and to file them in the prothonotary's office; and on failure to do so the court may non-pros the writ.⁵

§ 810. Before the argument of the appeal, it is the duty of the respective counsel to prepare paper books for the use of the judges. The appellant's paper book must contain: 1. The names of the parties, and the nature

¹ Walker's Appeal, 2 Dall. 190.

² Torr's Appeal, 1 Rawle, 76.

³ Rules of Court, 94.

⁴ Randolph v. Barbour, 6 Wheat. 128; 1 Curtis's Com. § 415.

⁵ Rules of Court, 93.

of the proceedings: 2. A short abstract of the bill or petition and answer: 3. A history of the case: 4. The report of the auditor or master, if there was one: 5. The exceptions taken to the report in the court below: 6. The opinion of the court on the exceptions, and the decree made: 7. Assignments of error: 8. The argument on the part of the appellant: 9. An appendix containing such documentary or other evidence as may be necessary.¹

§ 811. The history of the case must contain a closely condensed statement of all the facts, of which a knowledge may be necessary; and the want of such a statement cannot be supplied by reference to another part of the paper book. Each error relied on must be specified particularly, and by itself; if any specification embrace more than one point, or raise more than one distinct question, it will be considered a waiver of the errors so alleged. The brief of the argument must contain a clear statement of the points on which the party relies, with such reasons and arguments as he may see proper to add; together with all the authorities which he thinks pertinent. Where an authority is cited, the principle intended to be proved by it must be stated; a naked reference to the book will not be sufficient.²

§ 812. The paper book of the appellee may, if he choose, contain no more than his argument. But he may make it to embrace a counter statement, giving such version of the facts as he asserts to be the true one. Where the paper book of the appellee does not contain a counter statement, he will be taken as consenting to and concurring in the history of the case given by the other party.³

§ 813. The appellant must serve a copy of his paper book on the opposite party, or his attorney, at least ten

¹ Rules of Court, 104-5.

² Ibid. 105-6.

³ Ibid. 106-7.

days before the argument; and when the case is called must furnish one copy to each of the judges, and file two with the prothonotary for the reporter of the court. The appellee must also serve a copy of his paper book on the opposite party, or his attorney, at least three days before the argument, furnish a copy to each judge, and file two with the prothonotary.¹

§ 814. When the appellant is in default according to the foregoing rules, he may be non-suited on motion; and when the appellee is in default, he will not be heard by the court, except on the request of his adversary; and not then, if his negligence have been gross. When paper books are furnished which differ in any material respect from those prescribed, the parties furnishing them will be considered in the same default as if none had been furnished; and, on a proper occasion, the court will, of its own motion, nonsuit or silence the defaulting party. All paper books must be printed in the shape and size of a common octavo pamphlet, on ordinary printing paper.²

§ 815. The court will call the cases for argument in the order in which they stand on the printed argument list. Twenty-five cases only will be considered as liable to be called on each day during the term, including the one under argument, if not concluded on the preceding day: there will be no computations for the purpose of having cases inserted with ink, and not numbered on the regular printed series. If the parties, or either of them, be ready when a case is called, it will be heard or finally disposed of. But if neither party be present or ready to proceed with the argument, the cause will be non-prossed, unless reasons for the contrary be shown to the satisfaction of the court.³

¹ Rules of Court, 107.

² Ibid.

³ Ibid. 80.

§ 816. No counsel will be permitted to occupy more than one hour in the argument of any cause in the supreme court, unless with the special permission of the court, and in such cases only as may, in its judgment, require a relaxation of the rule. The counsel, if they think proper, may make such arrangement, as that one counsel may occupy more than an hour of the allotted time, it being understood, however, that his colleague, if any he have, be restricted in his argument to the residue of the time. Where there is but one counsel, he will be permitted to occupy two hours in his argument. No counsel is at liberty to read any part of a report, except the syllabus of the case, unless desired by a member of the court.¹

§ 817. The prothonotary is required to keep a separate list for short causes, to which all causes will be transferred, in which the attorney of either party shall certify that it is a short cause. The causes on this list have precedence over all others, on the Wednesday of every week, in which the same causes might be heard, if they had remained on the general list and had been reached in their order. Where a cause has been certified to be a short cause by the attorney of one party, and the attorney of the other party will certify that it is not so, and that injustice may be done to his client by placing it on the list of short causes, it will be put back again on the regular list. On the hearing of short causes, the speeches of counsel are limited to fifteen minutes on each side. It is the duty of the prothonotary to put up in the court room a copy of the short list, and this is deemed notice of the transfer of the causes which are on it. No party will be permitted to certify any cause back to the regular

¹ Rules of Court, 100.

list, after three days from the time it has been placed on the short list.¹

§ 818. Upon an appeal the cause is heard *de novo*, the appellant court re-examines the evidence, and determines the cause according to its own judgment: it may direct the case to stand over for further proofs,² and refer the case to a master, if in its discretion it may think proper so to do.³ An appeal brings up all the matters which were decided in the court below to the prejudice of the appellant, including a prior decree of that court from which an appeal was taken, but which appeal was dismissed under the rules of the supreme court.⁴

§ 819. The supreme court is required by statute to give its opinion on every point taken in the court below, and removed for its decision; and in every case to reduce its opinion to writing, endorsing thereon whether it deems the case of sufficient importance for publication; and immediately to file the same, together with one of the paper books, among the records of the court. And as soon as it has made a final decree in the cause, to order the record thereof, with its decree thereon written and duly certified, to be remitted to the court below; which decree such court shall duly carry into execution and effect; or the supreme court may, if it see cause, order execution thereof to be done by process issued out of the same, and thereupon order the record to be remitted as aforesaid.⁵ And by order of the 11th December 1854, it is made the duty of the prothonotary, in all cases where a cause goes back to the

¹ Rules of Court, 108.

² Wallace's Appeal, 5 Barr, 107; Finley v. Aiken, 3 Pittsburgh Leg. J. 3.

³ Dyott's Estate, 2 W. & S. 564.

⁴ Buckingham v. M'Lean, 13 How. U. S. 150; Light's Appeal, 10 Harris, 445; 1 Curtis's Com. § 414.

⁵ Purd. Dig. 772.

court below for further proceedings, to certify and send back with the order or decree, a copy of the opinion of the supreme court which shall have been filed; and the fees paid him therefor are to stand as part of the costs in the cause.

§ 820. Whenever any final decree in equity is made in the court of *nisi prius*, it is made the duty of the judge to grant an order, to certify the record of such case to the judges of the supreme court in banc for revision, upon the party aggrieved, his agent, solicitor, or attorney, making affidavit that such order is not sought by him for the purpose of delay, and upon giving absolute security, with two sureties, by recognisance, for the payment of all damages and costs, in case the proceedings shall be affirmed in the manner practised and allowed in cases of writs of error to the courts of common pleas. Such order to certify the record, will not, however, supersede any attachment or other process to enforce the decree, unless taken and perfected within twenty-one days after such final decree; and the *nisi prius* judge is empowered, in all cases, to fix the amount of security to be entered by the party aggrieved.¹

§ 821. In certain cases the party aggrieved may have a further appeal to the supreme court of the United States. These are enumerated in the judiciary act of 1789, which provides "that a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority

¹ *Purd. Dig.* 773-4.

exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the constitution, treaty, statute, or commission; may be re-examined, and reversed or affirmed in the supreme court of the United States, upon a writ of error; the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court; and the proceedings upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision, may, at their discretion, if the cause shall have once been remanded before, proceed to a final decision of the same and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.”¹

¹ See 1 Curtis's Com. § 208-79.

CHAPTER XIX.

SUPPLEMENTAL BILLS.

§ 822. IN the preceding chapters the reader's attention has been directed to the rules and course of proceeding in a suit originally perfect in its frame, and in which no incidental circumstances have occurred to alter the state of the original parties, or the relation in which they stood to each other at the commencement of the proceeding. In a suit in chancery, however, which frequently embraces a variety of matters, and affects the interests of many parties, it often happens that the suit, though perfect in its institution, has, by some event subsequent to the filing of the original bill, become defective, or has abated, so that no proceedings can be had, either as to the whole or some part of it; or it may happen that there is some imperfection existing in the frame of the original bill, which was not discovered in time to allow of its being corrected by amendment. When such is the case, the rules of the court furnish means of supplying the defect, by permitting the exhibition of what are termed supplemental bills, and bills of revivor; the former of which are applicable to cases in which the defect was either in the original proceeding, or has been occasioned by some event subsequent to the institution of the suit, so that the proceedings, as they stand, cannot have their full effect; the other being applicable, where, by some subsequent event, there is no person by whom

or against whom the suit, in the whole or in part, can be prosecuted.¹

§ 823. There are also other bills known in practice, which, though they are not strictly supplemental bills, or bills of revivor, strongly resemble them as well in form as in the practice consequent upon them; bills of this description are generally termed "bills in the nature of supplemental bills," or "bills in the nature of bills of revivor." And in some instances, the abatement of the suit gives rise to new matters which it becomes necessary to introduce into the proceedings, in which cases, the proper remedy is by bill of revivor and supplement.²

§ 824. A supplemental bill may be necessary to remedy defects in a suit, either existing at the time when the original bill was filed, or which have since occurred in consequence of the birth of new parties, or a change in the interests of those originally on the record. Where the imperfection of a suit arises from a defect in the original bill, or in some of the proceedings under it, and not from any event subsequent to the institution of the suit, it may be added to by supplemental bill merely. Nothing, however, which occurred prior to the filing of the original bill, ought to be added by way of supplement, unless the state of the cause be such that an amendment can no longer be obtained: but when the original bill cannot properly be amended, as where the parties are at issue upon the points of the original bill, and witnesses have been examined, then any new matter necessary to be put in issue can only be introduced by supplemental bill.³

§ 825. Matters which have occurred since the original bill was filed, and which are material to perfect the plaintiff's case, may also be introduced into the record by sup-

¹ 3 Dan. Ch. Pr. 1653.

² Ibid. 1653-4.

³ Ibid. 1654.

plemental bill; for generally such facts cannot be introduced by way of amendment. But to enable a complainant in equity to file a supplemental bill, introducing matters which have arisen since the filing of the original bill, the original bill must be one on which some valid decree could be made by the court. If wholly defective, it cannot be made the basis of a supplemental bill; for if the complainant had no ground for proceeding originally, he should file a new bill, showing a cause entitling him to relief. But if his original bill was sufficient to entitle him to one kind of relief, and facts subsequently occur which entitle him to other or more extensive relief, he may have such relief by setting out such new matter in the form of a supplemental bill.¹

§ 826. A supplemental bill for the mere purpose of bringing parties before the court, who ought to have been parties to the original bill, may be filed at any period of the cause; and it is not unfrequently the case, that where a cause, at the hearing, has been ordered to stand over, with liberty to add parties, it has been expressly directed, that they should be added by supplemental bill.² In such a case, the original defendants need not be made parties to the supplemental bill, unless they have an interest in the supplemental matter, or may be affected by the interest of the new party.³

§ 827. A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it may be carried fully into execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defence made to it; or it

¹ Bank of Kentucky v. Schuylkill Bank, 1 Pars. 214.

² 3 Dan. Ch. Pr. 1658.

³ Story's Eq. Pl. § 334.

may be used to impeach the decree, which is the peculiar case of a supplemental bill in the nature of a bill of review. But where a supplemental bill is brought in aid of a decree, it is merely to carry out and give fuller effect to that decree, and not to obtain relief of a different kind on a different principle; the latter being the province of a supplementary bill in the nature of a bill of review, which cannot be filed without the leave of the court.¹

§ 828. If any event happen which occasions an alteration in the interest of any of the parties to a suit, and does not deprive a plaintiff suing in his own right of his whole interest in the subject, as in the case of a mortgage or other partial charge of interest; or if a plaintiff suing in his own right be entirely deprived of his interest, but is not the sole plaintiff, the defect arising from this event may be supplied by a bill of the same kind; which is, in some respects, a supplemental bill merely, though in other respects, and especially against any new party, it has also, in some degree, the effect of an original bill.²

§ 829. If the interest of a plaintiff, suing in *autre droit*, entirely determine by death or otherwise, and some other person thereupon become entitled to the same property under the same title, as in the case of new assignees under a commission of bankruptcy, upon the death or removal of former assignees, or in the case of an executor or administrator, upon the determination of an administration *durante minore ætate*, or *pendente lite*, the suit may be likewise added to and continued by supplemental bill. For in these cases, there is no change of interest which can affect the questions between the parties, but only a change of the person, in whose name

¹ Story's Eq. Pl. § 338.

² Mitf. Eq. Pl. 63.

the suit must be prosecuted; and if there have been no decree, the suit may proceed, after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendants must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff. But if a decree have been obtained before the event on which such a supplemental bill becomes necessary, though the decree be only a decree *nisi*, there must be a decree on the supplemental bill, declaring that the plaintiff in that bill is entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and take the steps necessary to render it effectual.¹

§ 830. If, however, a sole plaintiff suing in his own right be deprived of his whole right in the matters in question, by an event subsequent to the institution of the suit, as in the case of a bankrupt or insolvent debtor, whose whole property is transferred to assignees; or in case such a plaintiff assign his whole interest to another, the plaintiff being no longer able to prosecute for want of interest, and his assignees claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by means of a supplemental bill, but must be sought by an original bill in the nature of a supplemental bill.²

§ 831. This distinction may, at first sight, appear artificial, but it is attended by a considerable difference in its practical results; for in those cases in which a supplemental bill only is filed, if there have been no decree, the suit may proceed after the supplemental bill has been filed, in the same manner as if the original plain-

¹ Mitf. Eq. Pl. 64-5.

² Ibid. 65.

tiff had continued such, except that the defendants must answer the original bill, and either admit or put in issue the title of the new plaintiff; but in the case of an original bill, in the nature of a supplemental bill, the whole case is open; a new defence may be made, the pleadings and depositions cannot be made use of in the same manner as if filed or taken in the same cause, and the decree, if any have been obtained, is no otherwise of advantage than as it may be an inducement to the court to make a similar decree; whilst in the case of a mere supplemental suit, as we have seen, the benefit of the original decree, if obtained, is expressly given to the new plaintiff by the supplementary decree, and he is declared entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and to take the steps necessary to render it effectual.¹

§ 832. If by any event the whole interest of a defendant be entirely determined, and the same interest is become vested in another by a title not derived from the former party, as in the case of the determination of an estate tail and the vesting of a subsequent remainder in possession, the benefit of the suit against the person becoming entitled by the event, must also be obtained by original bill in the nature of a supplemental bill: though, if the defendant whose interest has thus determined, be not the sole defendant, the new bill is supplemental as to the rest of the suit, and is so termed and considered. But if the interest of a defendant be not determined, and only become vested in another by an event subsequent to the institution of the suit, as in the case of alienation by deed or devise, or by bank-

¹ 3 Dan. Ch. Pr. 1666-7.

ruptcy or insolvency, the defect in the suit may be supplied by supplemental bill, whether the suit have become defective merely, or abated as well as become defective. For in these cases, the party comes before the court exactly in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning of the suit.¹

§ 833. In the case of defendants whose interest in the subject matter of the litigation becomes vested in others, *pendente lite*, without an actual abatement of the suit, a distinction is made between the transfer of that interest by the mere voluntary act of the defendant, as in the case of a sale or assignment in the ordinary course of business, and a transfer of that interest by operation of law, as upon an assignment in bankruptcy, or under our insolvent acts. In the first case, the complainant is not bound to make the assignee a party, though he may do so, if he deem it essential to the relief, to which he may be entitled against such assignee. But in the latter case, the assignee, who has become such by operation of law, has a right to be heard, and must be made a party before the suit can be further proceeded in.²

§ 834. The reason of this distinction is obvious. In the first case, the assignee who is a mere voluntary purchaser, *pendente lite*, cannot defeat the complainant's rights, or delay his proceedings by such purchase; for if he could do so, the litigation, by successive assignments, might be rendered interminable. He, therefore, has no right to be heard, unless he bring himself before the court by a supplemental bill, in the nature of a cross-bill; which he may sometimes do to protect his rights

¹ Mitf. Eq. Pl. 67-8.

² Sedgwick v. Cleveland, 7 Paige, 290.

as such assignee: and the decree in the original suit, to which such assignee was not a party, will bind the assigned property in his hands. Neither can the defendant, who has made such voluntary assignment subsequent to the commencement of the suit, urge that as a reason why the suit should not proceed against him, in the same manner as if no transfer had been made. In the other case, the assignee, upon whom the interest of the defendant has been cast by operation of law for the benefit of others, has a right to be heard for the protection of that interest. And the whole legal and equitable interest therein, which formerly belonged to the defendant, being vested in such assignee by the mere operation of law, he will not be legally or equitably bound by a decree to which he is not a party.¹

§ 835. A supplemental bill, when properly before the court, is an addition to the original bill, and becomes part of it, so that the whole bill is to be taken as an amended bill;² but a bill in the nature of a supplemental bill is not an addition to the original bill, but another original bill, which, in its consequence, may draw to itself the advantage of the proceedings on the former bill.³ The most prominent distinction between the two classes of bills seems to be, that a supplemental bill is properly applicable to those cases only, where the same parties, or the same interests, remain before the court; whereas an original bill in the nature of a supplemental bill, is properly applicable, when new parties with new interests, arising from events since the institution of the suit, are brought before the court.⁴

§ 836. With respect to the form of a supplemental

¹ Ibid.

² *Gillett v. Hall*, 13 Conn. 426; *Hill v. Hill*, 10 Ala. 527.

³ *Mitf. Eq. Pl.* 99.

⁴ *Story's Eq. Pl.* § 345.

bill, the rule of court directs that "it shall not be necessary, in any supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it."¹ The rule does not extend in terms to original bills in the nature of bills of supplement, nor is it very material to inquire whether they are intended to be included in it, since in either view of the case, the extent to which it will be necessary in bills of this description to re-state the pleadings in the original suit, will have to be determined by the special circumstances of the case.²

§ 837. With respect to a simple bill of supplement, filed against the parties to the original suit for the purpose of putting in issue new matter, it does not seem that it ever was the practice to introduce statements from the pleadings in the original suit. Where, however, the object of the supplemental bill is not to continue the suit against the person in whom the interest of a party, originally before the court, has become vested, but to bring before the court an entirely new party, who either was interested at the time the original bill was filed, or has become so under a new title, but derived from a former party; as in the case of a necessary party omitted, and subsequently brought before the court by supplemental bill; or of a new party coming into *esse* after the original bill is filed; there the supplemental bill is, in fact, an original bill against the new defendant, and must state enough of the case to put the title of the plaintiff to relief against such new defendant, in issue. For as a defendant, who was not a party to the original bill, coming in upon a new title, cannot be called upon to answer the original bill, there is no other method by which the plain-

¹ Equity Rules, lvi. p. 132.

² 3 Dan. Ch. Pr. 1675.

tiff's title to maintain the suit, as against him, can be put in issue, than by a statement of it in the supplemental bill. For this purpose, however, the mere statement of the former proceedings has been held sufficient to put the facts of the case in issue, with regard to this sort of defendant, that is, you may in the supplemental bill state, that you made such a representation in the former bill, instead of representing the facts in the second bill.¹

§ 838. If the supplemental bill be occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration of parties thereon; and it must pray, that the defendants may appear and answer to the charges it contains; for if the supplemental bill be not for a discovery merely, the cause must be heard upon the supplemental bill, at the same time that it is heard upon the original bill, if it have not been before heard; and if the cause have been before heard, it must be further heard upon the supplemental matter.² A supplemental bill generally calls upon the defendant to answer the supplemental matter only: if, however, it be occasioned by the transmission of the interest of a defendant who has not answered the original bill, and it be necessary to have a discovery from the new defendants, of the matters in the original bill, it may pray that the defendants may answer the original bill.³

§ 839. An original bill in the nature of a supplemental bill, must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the court ought to grant the benefit of the former suit, to or against the person so become entitled,

¹ 3 Dan. Ch. Pr. 1675-6.

² Ibid. 1677.

³ Ibid. 1679.

and pray the decree of the court adapted to the case of the plaintiff in the new bill.¹

§ 840. It is provided by rule of court, that whenever any suit in equity shall become defective from any event happening after the filing of the bill, (as, for example, by a change of interest in the parties) or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court, upon proper cause shown, and due notice to the other party. And if leave be granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule day, after the supplemental bill is filed in the prothonotary's office, unless some other time shall be assigned by a judge of the court.² Where new parties are brought before the court by a supplemental bill, it is proper to issue a subpoena to appear and answer the supplemental bill;³ a practice which does not seem to be dispensed with by the foregoing rule of court.

§ 841. In order to obtain leave to file a supplemental bill in the nature of a bill of review, a petition must be presented, supported by an affidavit, to show that the "new matter could not be produced or used by the party claiming the benefit of it at the time when the decree was made." If the court be satisfied that the new matter is relevant and material, and such as might probably have occasioned a different determination, it will permit a bill of review to be filed. The bill prays "that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill, and that the

¹ 3 Dan. Ch. Pr. 1688.

² Equity Rules, lv. p. 131.

³ Dan. Ch. Pr. 1680.

plaintiff may have such relief as the nature of the case made by the supplemental bill requires.”¹

§ 842. Another description of bill in the nature of a supplemental bill, is what is termed “a bill to carry a decree into execution.” Such a bill is proper where, after a decree has been pronounced, it has happened, that owing to some neglect of the parties to proceed upon the decree, their rights have become so embarrassed by subsequent events, that no ordinary process of the court upon the first decree will serve, and it is therefore necessary to have another decree of the court to ascertain and enforce them.² A bill for this purpose, is generally partly an original bill and partly a bill in the nature of an original bill, although not strictly original; and sometimes it is likewise a bill of revivor, or a supplemental bill, or both; and the frame of the bill and the course of proceedings upon it vary accordingly.³ A bill to suspend or avoid the operation of a decree, is likewise supplemental in its nature; but such bills are of rare occurrence, and not likely to arise in our practice.

¹ Mitf. Eq. Pl. 91.

² 3 Dan. Ch. Pr. 1689.

³ Mitf. Eq. Pl. 97.

CHAPTER XX.

BILLS OF REVIVOR.

§ 843. WHERE a suit is perfect in its original formation, but afterwards becomes discontinued or imperfect by abatement, the general method of continuing it, or of remedying the defect, is by bill of revivor.¹ With respect to the species of abatement which may be remedied by bill of revivor, it is laid down, that whenever a suit abates by death, and the interest of the person whose death has caused the abatement, is transmitted to that representative which the law gives or ascertains, as an heir at law, executor, or administrator, so that the title cannot be disputed, at least in the court of chancery, but the person in whom the title is vested is alone to be ascertained, the suit may be continued by bill of revivor merely; so also, if a suit abate by the marriage of a female plaintiff, as no act is done to affect the rights of the party but the marriage, no title can be disputed: the person of the husband is the sole fact to be ascertained, and therefore the suit may be continued in this case likewise, by bill of revivor merely.²

¹ 3 Dan. Ch. Pr. 1693.

² Ibid. 1696-7. The act of 12 April 1845, provides, that no suit, or other legal proceeding, in any court of this commonwealth, brought by a feme sole, shall abate by the marriage of the plaintiff or petitioner, contracted after the commencement of the same; but the husband of such plaintiff or petitioner shall have power to become a party thereto, and prosecute the same to final

§ 844. It is generally necessary, in order to entitle a party to revive, that there should be a privity between him and the individual whose death has caused the abatement: it is upon this ground held, that where the interest of a plaintiff suing in *autre droit* determines, the suit must be continued by supplemental bill, and not by bill of revivor. It seems, however, that the rule will not hold, where a man files a bill as administrator and dies; in such case, the administrator *de bonis non* may sustain a bill of revivor, although there is no actual privity between him and the original plaintiff.¹

§ 845. If, however, upon the abatement happening, the interest of the party do not vest in any representative which the law gives or ascertains, as in the case of bankruptcy or insolvency, or of a devise of real estate, the suit cannot be continued by bill of revivor; but must, where the abatement is caused by the bankruptcy or insolvency of a defendant, be continued by supplemental bill, which in this case is called "a supplemental bill in the nature of a bill of revivor." So, where the suit is abated by the bankruptcy or insolvency of a sole plaintiff, his assignees cannot continue the suit by bill of revivor, but must do so by "original bill in the nature of a supplemental bill." So also, in a suit relating to land, where a plaintiff dies, having devised the land which is the subject of the litigation, the suit must be continued by the devisee by another

judgment or decree. *Purd. Dig.* 19. It may be questioned, whether this act will authorize the husband of a female plaintiff, who was sole at the commencement of the suit, to become a party without a bill of revivor; the act appears to have been passed to meet the case of an action at common law, in which the marriage of a female plaintiff, was an absolute abatement of the suit, and the law furnished no means by which an action so abated could be continued for the benefit of the parties in interest. See 1 *Chit. Pl.* 449; *Story's Eq. Pl.* § 354.

¹ 3 *Dan. Ch. Pr.* 1697.

species of bill, called "an original bill in the nature of a bill of revivor."¹ The same rule applies to abatements occasioned by the death of parties defendant as well as parties plaintiff; therefore, a bill of revivor will not lie against the devisee of a defendant, but the suit must be continued against him in the same manner that it is continued by the devisee of a plaintiff.²

§ 846. A suit in equity does not abate by the death of a co-plaintiff or co-defendant;³ in such case the court can go on and decree as to the survivor, but not as to the deceased, until his representatives are brought in.⁴ If the interest of the party dying so determine, that it can no longer affect the suit, and no person become entitled thereupon to the same interest; which happens in the case of a tenant for life, or person having a temporary or contingent interest, or an interest defeasible on a contingency; the suit does not so abate as to require any proceeding to warrant the prosecution of it against the remaining parties.⁵

§ 847. In general, the court will not permit a suit to be revived for the purpose of deciding the question of costs only. The rule being, that if a party die before taxation of costs, there can be no revivor in respect of costs only, against his personal representative.⁶ The principle, that there can be no revivor for costs, precludes any other person than the plaintiff, or his representative, from reviving before decree; for the plaintiff may, at his pleasure, dismiss the bill with costs, and therefore a revivor by any other party would, in effect, be for costs alone. If the plaintiff neglect to revive, the defendant's

¹ 3 Dan. Ch. Pr. 1697; *Brady v. M'Cosker*, 1 Comst. 219.

² 3 Dan. Ch. Pr. 1698.

³ *Fisher v. Rutherford*, 1 Bald. 188.

⁴ *Bank v. Biddle*, 2 Pars. 31.

⁵ 3 Dan. Ch. Pr. 1698.

⁶ *Ibid.* 1694-5.

remedy is, to move that he may do so within a limited time, or that the bill may be dismissed. It is otherwise after decree; for then all parties are equally entitled to its benefit; and on neglect by the plaintiffs, or those standing in their right, a defendant may revive.¹

§ 848. The construction of a bill of revivor is similar in principle to that of an original bill. It states the filing of the original bill, but need not set forth any of the statements in it, unless required by the special circumstances of the case.² It would seem, however, that sufficient should be set out to show the plaintiff's title to revive. It then states the original prayer of relief, the proceedings which have taken place, the event which has caused the abatement, and the plaintiff's title to revive; and charges, that the same ought to be revived and stand in the same condition, with respect to the parties in the bill of revivor, as it was with respect to the parties to the original bill at the time the abatement happened; and it must pray that the suit may be revived accordingly, or that the defendant may show cause to the contrary.³

§ 849. The rules of court provide, that whenever a suit in equity shall become abated, by the death of either party, or by any other event, the same may be revived, by a bill of revivor, or by a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the prothonotary's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the prothonotary, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause be

¹ Adams' Eq. 406-7.

² Eq. Rules, lvi. p. 132.

³ 3 Dan. Ch. Pr. 1706.

shown, at the next rule day, which shall occur after fourteen days from the time of the service of the process, the suit shall stand revived, as of course.¹

§ 850. We have seen, that if the death of a party, whose interest is not determined by his death, be attended with such a transmission of his interest, that the title to it, as well as the person entitled, may be litigated in the court of chancery, as in the case of a devise of real estate, the suit cannot be continued by a mere bill of revivor. An original bill, upon which the title may be litigated, must be filed; and this bill will have so far the effect of a bill of revivor, that if the title of the representative substituted by the act of the deceased party be established, the same benefit may be had of the proceedings upon the former bill, as if the suit had been continued by a bill of revivor.²

§ 851. The distinction between bills of revivor and bills in the nature of bills of revivor seems to be, that the former, in case of death, are founded upon privity of blood or representation by operation of law; the latter, in privity of estate, or title by the act of the party. In the former case, nothing can be in contest, except whether the party be heir or representative; in the latter, the nature and operation of the whole act, by which the privity of estate or title is created, is open to controversy: thus, for example, the heir may be made a party by a bill of revivor, for his title is by mere operation of law; but the devisee must come in by a bill in the nature of a bill of revivor; for he comes in as a purchaser under the testator, in privity of estate or title, which may be disputed.³

§ 852. The bill is said to be original, merely for want

¹ Equity Rules, lv. p. 131.

² 3 Dan. Ch. Pr. 1718.

³ Ibid. 1718-19.

of that privity of title between the party to the former bill, and the party to the latter bill, though claiming the same interest, which would have permitted the continuance of the suit by a bill of revivor; therefore, when the validity of the alleged transmission of interest is established, the party to the new bill will be equally bound by, or have advantage of, the proceedings on the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest; and the suit is considered as pending from the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross-bill, and every other advantage which would have attended the institution of the suit by the original bill, if it could have been continued by bill of revivor only.¹

§ 853. If a suit become abated, and by any act besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement, or a devise under certain circumstances, though a bill of revivor merely may continue the suit so as to enable the parties to prosecute it; yet, to bring before the court the whole matter necessary for its consideration, the parties must, by supplemental bill added to and made part of the bill of revivor, show the settlement, or devise, or other act, by which their rights are affected; and in the same manner, if any other event which occasions an abatement, be accompanied or followed by any matter necessary to be stated to the court, either to show the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to show by or

¹ 3 Dan. Ch. Pr. 1719.

against whom the cause is to be revived, that matter must be set forth by way of supplemental bill added to the bill of revivor.¹

§ 854. A bill of revivor and supplement is merely a compound of these two species of bills, and must be framed and proceeded upon in the same manner. They are each liable to the same description of defence as the bills, if separate, would be liable to; and it is to be recollected, that in all cases where there is a bill of revivor and supplement, the case must be set down for hearing against all the parties, although the bill be only a bill of revivor against one, and an order to revive have been obtained.²

¹ 3 Dan. Ch. Pr. 1722.

² Ibid. 1722-3.

CHAPTER XXI.

BILLS OF REVIEW.

§ 855. AFTER a decree has been made in a cause, a new original bill cannot be brought between the same parties and for the same matters, unless the decree have been obtained by fraud. If a party seek to reverse a final decree, for error apparent on the record, or on the occurrence or discovery of new matter, he must file a bill of review. A bill of review is in the nature of a writ of error, and its object is to procure an examination, and alteration or reversal, of a decree made upon a former bill.¹

§ 856. A bill of review, according to the first of the ordinances of Lord Chancellor Bacon respecting bills of that kind, can be brought only in two cases. The first is, for error in law appearing in the body of the decree, without further examination of matters of fact; and the second is, for new matter which hath arisen after the decree. A bill of review may also, by special leave, be allowed for new proof that has come to light after the decree, which could not possibly have been used at the time when it passed. It is said, that this rule has never been departed from. Even if an absolute decree be made against an infant, it seems to be necessary that his infancy should appear upon the face of the decree. In

¹ Story's Eq. Pl. § 403.

this country, however, the bill, answers, and pleadings, are regarded as forming part of the decree, and in that respect the course here differs from the English practice.¹

§ 857. For error of law apparent on the face of the decree, the bill may be filed without leave of the court, but the error complained of must not be mere error in the decree, as on a mistaken judgment, which would in effect render a bill of review a mere substitute for an appeal, but it must be error apparent on the face of the decree, as in the case of an absolute decree against an infant. Errors in form only, though apparent on the face of the decree, and mere matters of abatement, seem not to have been considered sufficient ground for review.²

§ 858. Where a bill of review is founded on the occurrence or discovery of new matter, the leave of the court must be first obtained; and this will not be granted except on an affidavit, satisfying the court that the new matter could not, by reasonable diligence, have been produced or used by the applicant, at the time when the decree was made; and showing also, that such new matter is relevant and material, either as evidence of matter formerly in issue, or as constituting a new issue, and is such as, if previously before the court, might probably have occasioned a different decision.³ If such a bill be filed without leave, it may be taken off the file, or the proceedings stayed.⁴

§ 859. The time within which a review may be had does not seem to have been settled in Pennsylvania. In England, the rule is not to reverse or review after twenty years, except for very apparent error. As a bill of review is in the nature of a writ of error, it is probable

¹ Riddle's Estate, 7 Harris, 433.

² Adams' Eq. 416.

³ Mitf. Eq. Pl. 84-7.

⁴ Hodson v. Ball, 11 Sim. 456.

this period of twenty years was adopted by analogy, from the statutes limiting writs of error in certain cases; and should it become necessary with us to fix the time within which a review may be granted, the period will probably be much abridged by reference to our act of 1791, prohibiting writs of error after seven years; or it may be to the act of 1840, limiting the time within which a petition of review may be filed in the orphans' court, in certain cases, to five years after the final decree.¹

§ 860. Only parties or privies, as heirs, executors, or administrators, can ordinarily bring this bill. But under our practice, a bill of review may be filed in the orphans' court, in cases within the provisions of the act of 1840, by any person interested; as, for example, the sureties of an administrator; and this is said by the supreme court to conform to the chancery doctrine on the subject.²

§ 861. In England a bill of review, on new matter discovered, has been permitted even after an affirmance of the decree in Parliament; but after a decree in equity has been affirmed in the supreme court, on appeal, a bill of review does not lie in the court below, for any error in law apparent on the face of the decree.³ This rule is absolutely necessary to prevent the confusion and mischief which would flow from practically transposing the relative position of our courts, superior and inferior; an inconvenience which the occasional correction of mistake, in a comparatively few individual cases, would not compensate. Nor does the rule deny a remedy for error committed by the appellant jurisdiction. No question can be made of the power of the supreme court to entertain a petition for a rehearing of its own decree, in the nature

¹ George's Appeal, 2 Jones, 262.

² Bishop's Estate, 10 Barr, 471.

³ 2 Hoffman's Ch. Pr. 12.

of a bill of review, while the record remains in its possession. But it is too late, after the record has been remitted to the court below for execution; for then there is nothing remaining in the court upon which it can act.¹ It would seem, from the general language of the supreme court in *Dennison v. Goehring*, that no bill of review would lie in the court below, after an affirmance on appeal, whether for errors in law, or arising upon new facts, or facts newly discovered: the point decided, however, does not go to such a length.

§ 862. The question then naturally presents itself, whether, in this state, after an affirmance of the decree on appeal, and a remittitur of the record, a party be wholly without remedy for error in the decree arising upon new facts, or facts newly discovered. And it would seem, that in such case, notwithstanding the rule above stated, the party may be relieved from the consequences of an erroneous decision. The remedies in equity are pliable and easily adapted to any state of circumstances which may arise; courts of chancery regard the end rather than the means; and to administer justice and equity to their suitors, they permit a combination of almost every conceivable species of bill, which may be necessary to effect the justice of the case. It would seem, therefore, that by bill of *certiorari* and review, this object might be accomplished. The object of a bill of *certiorari* is to remove a suit in equity, pending in some inferior court, into the court of chancery, or some other superior court of equity, on account of some incompetency in the inferior court to do complete justice between the parties.²

¹ *Dennison v. Goehring*, 6 Barr, 402, 405.

² Story's Eq. Pl. § 298; Mitf. Eq. Pl. 50.

§ 863. Now this is precisely the position of a court of common pleas, after an affirmance of its decree in equity, on appeal to the supreme court; and it would seem to be proper in such case, to present in the supreme court a bill of *certiorari* and review, setting forth the former proceedings in the cause, the appeal, the affirmance of the decree, and that the record has been remitted to the court below; the grounds upon which the decree ought to be reviewed, and the inability of the court in which the record remains to administer justice by entertaining a bill of review; it might then go on to pray the allowance of a writ of *certiorari* to remove the record to the supreme court, and that the former decree might be there reviewed and reversed in the points complained of. It is true, no such bill could be entertained in the house of lords, according to the English practice, but then it must be remembered, that the house of lords has no jurisdiction in equity or otherwise, except on appeal, and that no bill can be filed in that court for any purpose; whereas our supreme court has jurisdiction both of an appeal and on original bill.¹ The subject is not without great difficulties, but the author has ventured to suggest this course as most in accordance with the acknowledged principles of equity.

§ 864. In a bill of review, it is necessary to state the

¹ It may be objected, that the supreme court, in revising the decrees of the subordinate courts of equity, acts as an appellant court merely, and that a bill of review is in the nature of an original bill; but it must be borne in mind, that though this be conceded, yet the decree which is sought to be reviewed by such a bill, is not the decree of the subordinate tribunal, but that of the supreme court itself, and the object of it is, to enable that court to review and reverse, for errors in fact, not apparent upon the record, its own decree; which it cannot do, unless the record be removed for that purpose. The author has, with much diffidence, prepared and presented in the appendix a form of bill, in accordance with the views here suggested.

former bill and the proceedings thereon, the decree, the point in which the party conceives himself aggrieved by it, and the ground of law, or new matter, upon which he seeks to impeach; and if the decree be impeached on the latter ground, it seems necessary to state in the bill, the leave obtained to file it, and the fact of the discovery; though it may be doubted whether, after leave given to file the bill, that fact be traversable. The bill may pray, simply, that the decree may be reviewed and reversed in the point complained of, if it have not been carried into execution. If it have been carried into execution, the bill may also pray the farther decree of the court, to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill be brought to review the reversal of a former decree, it may pray that the original decree may stand. The bill may also, if the original suit have become abated, be at the same time a bill of revivor. A supplemental bill may likewise be added, if any event have happened which requires it, and particularly if any person, not a party to the original suit have become interested in the subject, he must be made a party to the bill of review by way of supplement.¹

§ 865. If the decree have not been signed and enrolled, and the supposed error appear from new matter which has arisen since the decree, or upon new proof materially pressing upon the decree, and discovered after the decree, or at least after the examination of witnesses in the cause, the remedy is by a supplemental bill in the nature of a bill of review. In this case leave must be obtained to file a supplemental bill in the nature of a

¹ 3 Dan. Ch. Pr. 1728-9.

bill of review, by a petition, supported by affidavit, similar to that used for liberty to file a bill to review a decree on new facts or new evidence discovered. There is this difference between a bill of review and a supplemental bill in the nature of a bill of review: in the former, if introducing also matter of supplement or revivor, the prayer, so far as it is a bill of review, is, that the decree may be reviewed and reversed; in the latter, adopting also the proper prayer for revivor, as to the supplemental matter the prayer is, that the cause may be reheard.¹

§ 866. An original bill in the nature of a bill of review, is applicable when the interest of the party seeking a reversal was not before the court when the decree was made. Thus, if a decree be made against a tenant for life, a remainder-man in tail or in fee cannot defeat the proceedings, except by a bill showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accrual of his own interest; and thereupon praying that the proceedings in the original cause may be reviewed, and that, for that purpose, the other party may appear to and answer this new bill, and the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court.²

§ 867. A bill to impeach a decree for fraud used in obtaining it, sufficiently explains its own character. It may be filed without the leave of the court, because the alleged fraud is the principal point in issue, and must be established by proof, before the propriety of the de-

¹ 3 Dan. Ch. Pr. 1739.

² Mitf. Eq. Pl. 92.

cree can be investigated. And where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be. A bill to set aside a decree for fraud, must state the decree and the proceedings which led to it, with the circumstances of fraud on which it is impeached. The prayer must necessarily be varied according to the nature of the fraud used, and the extent of its operation in obtaining an improper decree.¹

¹ Mitf. Eq. Pl. 93-4.

CHAPTER XXII.

CROSS BILLS.

§ 868. As a defendant cannot pray any thing in his answer, except to be dismissed the court, if he have any relief to pray or discovery to seek, he must do so by a bill of his own, which is called a cross-bill. A cross-bill is a bill brought by a defendant against a plaintiff, or other parties in a former bill pending, touching the matters in question in that bill. It is treated as a mere auxiliary suit, or as a dependency upon the original suit, and can be sustained only on matter growing out of the original bill.¹ It is, however, the character of the bill and of the relief sought which determines whether it be an original or a cross-bill. That it is called in the body of it a cross-bill is wholly immaterial.²

§ 869. A cross-bill is usually brought either to obtain a necessary discovery of facts in aid of the defence to the original bill, or to obtain full relief to all parties, in reference to the matters of the original bill; but a cross-bill should never be brought where the party can obtain, in the original suit, the same relief asked for by the cross-bill. The rules of equity prevent a defendant examining a plaintiff: hence arises the necessity of a cross-bill for discovery, when the testimony of the plaintiff is sought by the defendant as to any material facts.

¹ 3 Dan. Ch. Pr. 1742.

² Pollock v. National Bank, 3 Seld. 274.

The cross-bill gives a perfect reciprocity of proof to each party, derivable from the answers of each other.¹

§ 870. It frequently happens, and particularly if any question arise between two defendants to a bill, that the court cannot make a decree without a cross-bill or cross-bills to bring every matter in dispute completely before the court. In such a case it becomes necessary for some one of the defendants to the original bill, to file a bill against the plaintiff and other defendants in that bill, or some of them, and bring the litigated point properly before the court; for one defendant cannot have a decree against a co-defendant without a cross-bill, with proper prayer and process, or answer, as in an original suit.²

§ 871. A cross-bill is a mode of defence: the original bill and the cross-bill are but one cause. It must be confined to the subject matter of the original bill, and cannot introduce new and distinct matters, not embraced in the original suit, and if it do so, no decree can be founded on those matters. The plaintiff in a cross-bill cannot contradict the assertions in his answer in the original suit; but as it is considered simply as a mode of defence, or a proceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not, at least as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the court. He may rely upon matters purely legal, connected with the matters of the original bill, for his defence, and by his cross-bill require the plaintiff to answer thereto. It is treated, in short, as a mere auxiliary suit, or a dependency upon the original suit.³

¹ 3 Dan. Ch. Pr. 1742.

² Ibid. 1742-3.

³ Ibid. 1744, 1746.

§ 872. A cross-bill may be filed to answer the purposes of a plea *puis darrein continuance* at the common law. Thus where, pending a suit, and after replication and issue joined, the defendant, having obtained a release, attempted to prove it, *vivâ voce*, at the hearing, it was determined that the release not being in issue in the cause, the court could not try the fact, nor direct a trial at law for that purpose, and that a new bill must be filed to put the release in issue.¹ It seems, that a cross-bill is always necessary, where the defendant is entitled to some positive relief beyond what the scope of the plaintiff's suit will afford him.²

§ 873. A cross-bill should state the original bill and the proceedings thereon, and the rights of the party exhibiting the bill, which are necessary to be made the subject of cross-litigation, or the ground on which he resists the claims of the plaintiff in the original bill, if that be the object of the new bill. The appearance of the defendant to a cross-bill is enforced by subpoena, in the same manner as to an original bill.³

§ 874. Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill must first answer thereto, before the original plaintiff is compellable to answer the cross-bill. And the answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill, at the hearing, in the same manner and under the same restrictions as the answer to the bill praying relief may be read and used.⁴

§ 875. The original cause and cross-cause are usually, although not necessarily, heard together; this rule ap-

¹ 3 Dan. Ch. Pr. 1743.

² Ibid. 1744.

³ Ibid. 1746-7.

⁴ Equity Rules, lxviii. p. 138.

plies where both causes are at issue, and in a situation to be heard, and then the plaintiff in the cross-suit may have an order that they be heard together; but the delay of the plaintiff in the cross-suit will not be permitted to delay the hearing of the original cause. The order, that the causes may be heard together, is obtained on a motion *ex parte*, and a copy of the order should be served.¹

¹ 3 Dan. Ch. Pr. 1751.

CHAPTER XXIII.

INTERLOCUTORY APPLICATIONS.

§ 876. AN interlocutory application is a request made to the court, either orally or in writing, for its interference in a matter arising in the progress of the cause, whether before it has been brought to a hearing, or afterwards, in consequence of a decree or order made upon such hearing; and it may either relate to the process of the court, or to the protection of the property in litigation *pendente lite*, or to any matter upon which the interference is required before or in consequence of a decree or decretal order. Interlocutory applications are extremely various, and the occasions upon which they can be made are too numerous to be discussed in a treatise of this nature; all, therefore, that can now be done, is to direct the reader's attention to some of the most important and frequent occasions upon which such interlocutory applications may be made, and to point out the course of practice upon each.¹

§ 877. Applications of this nature, when made *vivâ voce* to the court, are called motions; when they are in writing, they are called petitions: there does not, however, appear to be any distinct line of demarkation between the cases in which they should be made by motion, and those in which they should be made by peti-

¹ 3 Dan. Ch. Pr. 1781.

tion; the practice in this respect being generally regulated by the circumstances of each case.¹ As a general rule, motions can only be made on behalf of the parties to the record; and where they have for their object the giving effect to decrees or orders, should be confined to cases where the order which is to be made upon the motion arises out of recent proceedings upon which there is no doubt; for as the adverse party knows nothing but by the notice, containing only the name of the cause, and what is prayed of the court, the proceedings ought to be recent and notorious, so as that the adverse party may be supposed to be perfectly conusant of all the steps and proceedings in the cause, as much as if, at a greater expense, they were recited in a petition.² In all other cases a petition should be presented.

§ 878. A motion is either *of course*, that is, for an order which, by some standing rule or known practice of court, may be granted without hearing both sides; or *special*, that is, for an order which is not a mere matter of course, and can only be granted under special circumstances, or upon notice duly served upon the opposite party. A motion of course requires no notice, as no opposition will be allowed to it; but if it be obtained upon a false suggestion, it may be set aside upon application by special motion. A special motion may be made, either *ex parte* or upon notice: when made *ex parte*, it must be supported by the affidavit of the party making the application, and by such collateral affidavits as may be necessary to make out a sufficient case for the interference of the court. It is impossible to lay down any clear rule defining such motions as may be made *ex parte*, and dis-

¹ 3 Dan. Ch. Pr. 1781.

² Lord Shipbrook v. Lord Hinchinbrook, 13 Ves. 393.

tinguishing them from such as require notice; but, in general, special applications concerning the proceedings in the cause, not regulated either by the general equity rules, or by any clearly defined rule of practice, must almost always be made upon notice.¹

§ 879. The equity rules prescribe, that the prothonotary's office shall be open, and the prothonotary shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course, and applied for, or had, by the parties or their solicitors, in all causes pending in equity.² And that all motions and applications in the prothonotary's office, for the issuing of mesne process, and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and other proceedings in the prothonotary's office, which do not, by the general equity rules, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications grantable of course by the prothonotary of the court; but the same may be suspended, or altered, or rescinded, by any judge of the court, upon cause shown.³

§ 880. Any judge of the supreme court, or courts of common pleas, as well in vacation as in term, may, at chambers, or, on rule days, at the prothonotary's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of causes upon their merits, in the same manner, and with the

¹ 3 Dan. Ch. Pr. 1788-90.

² Equity Rules, ii. p. 111.

³ Ibid. v. p. 112.

same effect, as the court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party or his solicitor, to appear and show cause to the contrary, at the next rule day thereafter, unless some other time be assigned by the judge for that purpose.¹

§ 881. All motions for rules or orders, and proceedings, which are not grantable of course, or without notice, must, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the equity docket, and will be heard at the next rule day after that on which the motion is made. And if the adverse party, or his solicitor, do not then appear, or show good cause against the same, the motion may be heard by any judge of the court, *ex parte*, and granted, as if not objected to, or refused, in his discretion.²

§ 882. All motions, rules, orders, and other proceedings, made and directed, at chambers, or, on rule days, at the prothonotary's office, whether special or of course, must be entered by the prothonotary in his equity docket, to be kept at the prothonotary's office, on the day when they are made and directed; which book, it is provided, shall be open at office hours, to the free inspection of the parties in any suit in equity and their solicitors. A notice thereof given to the solicitors, is deemed notice to the parties for whom they appear, in all cases where personal notice to the parties is not otherwise specially required.³

§ 883. The principal interlocutory applications which are necessary to be specially considered, are the granting of an injunction, or writ of *ne exeat regno*; the appoint-

¹ Equity Rules, iii. p. 111.

² Ibid. vi. p. 113.

³ Ibid. iv. p. 112.

ment of a receiver; the payment of money into court; and the production of documents. The subject of injunctions has already, in a former chapter, been treated of at large; and as the writ of *ne exeat regno* is a writ simply to hold a defendant to bail to answer an equitable demand, and will only be granted where such demand is of a pecuniary nature, it would appear to be prohibited, in most cases, as an equitable remedy, by the act of 1842 to abolish imprisonment for debt.¹

¹ Purd. Dig. 28.

CHAPTER XXIV.

RECEIVERS.

§ 884. A RECEIVER is an indifferent person between the parties, appointed by the court to receive the rents, issues, and profits of the lands, or other thing in question in the court, pending the suit, where it does not seem reasonable to the court that either party should do it; or when a party is incompetent to do so, as in case of an infant. He is to account for such receipts when the court shall require him, and to secure his so doing, he is commonly ordered to give security for the faithful performance of his trust. The appointment of a receiver is a matter resting in the discretion of the court; and the receiver, when appointed, is treated as virtually an officer and representative of the court, and subject to its order.¹

§ 885. The most ordinary cases in which receivers are granted by the court, are those in which the suit arises out of claims by parties having equitable interests in the subject; in such cases the court will appoint a receiver, for the purpose of protecting the property till the question between the parties shall have been determined. And, in general, it may be taken as a rule, that where the legal estate is vested in an individual claiming an interest paramount to that of the litigant parties, so that the litigant parties can only have an equitable interest, the

¹ 3 Dan. Ch. Pr. 1949; Gowan v. Jeffries, 2 Ash. 303.

court will grant a receiver, although in doing so, it will always take care not to interfere with the rights of the party having the prior estate. But where the party having the legal estate is in the actual possession of the property, a receiver will not be granted unless under very peculiar circumstances.¹ The taking possession by the court of property, the subject of the suit, to preserve it until the final determination of the litigation, is a strong measure. To authorize it, when such property is in the apparent legal possession of the defendant, the plaintiff must show a clear right thereto, or a *prima facie* right, with sufficient facts to induce the court to consider the property in danger while in its existing custody. An equity judge, before he will exercise such a power, reflects well on the results of the action proposed to him, and will prefer to remain passive, where serious collateral results might ensue from too rigorous an activity, and when no real evil seems to follow from resting quiescent.²

§ 886. The court will appoint a receiver against a party having possession under a legal title, if it can be satisfied that such party is wrongfully entitled to such legal estate. Thus, where fraud can be clearly proved, and immediate danger is likely to result, if the immediate possession should not be taken under the care of the court, a receiver will be appointed. If, however, there be no circumstances of either actual or constructive fraud, and no case of spoliation, the court will not appoint a receiver. But although the court will not interfere upon the mere ground of title, it will appoint a receiver at the instance of the parties beneficially interested, even where

¹ 3 Dan. Ch. Pr. 1950, 1952.

² Langolf v. Seiberlitch, 2 Pars. 80; Thompson v. Diffenderfer, 1 Maryland Ch. Dec. 489.

there is no fraud or spoliation, provided it can be satisfactorily established that there is danger to the estate or fund, unless such a step be taken. Thus, in the case of executors, if the executor have wasted the effects, or in other respects misconducted himself, the court will interfere by the appointment of a receiver.¹

§ 887. The same grounds will induce the court to interfere in the case of a party clothed with the character of a trustee, and that whether he be a mere trustee or a trustee having an interest in the estate or fund. Thus, where a trustee refuses to act, the court will, on the application of the persons beneficially interested, appoint a receiver.² And so, where a trustee or assignee is dismissed from the trust, it is provided by act of assembly, that the court may order and direct all books, papers, moneys and effects, in the hands of such dismissed trustee or assignee, to be forthwith delivered or transferred to such other person or persons as the court may appoint to receive the same, upon security being given by such receiver according to the order of the court.³

§ 888. It is also provided by statute, that where any petitioner for the benefit of the insolvent laws shall be bound over, or committed for trial, or tried and convicted, of fraudulent insolvency, it shall be the duty of the court, on the application of any creditor, to appoint a receiver of all the estate which belonged to such insolvent; which receiver shall be appointed and removed in the same manner, invested with like power, perform like duties, subject to like control of the court, give security in like form, and generally do and perform all the duties enjoined by law on the assignees of estates of insolvent debtors, and shall by force and virtue of such appoint-

¹ 3 Dan. Ch. Pr. 1955-6.

² Ibid. 1958.

³ Purd. Dig. 804.

ment become absolutely vested with all the estate, property, and effects of such insolvents, as fully as assignees of insolvent debtors are by the laws of this commonwealth, and be able and capable in law to sue and be sued in like manner, being in all cases styled and named receiver of such estates.¹

§ 889. In cases of partnership also, the court frequently appoints a receiver of the partnership estate. Regarding co-partnership property, as it truly is, first, as a general fund for the payment of partnership debts, and, these being satisfied, as the common fund of the co-partners, in which none have an exclusive interest, the court, after a dissolution, in the event of a disagreement as to the disposition of it, takes upon itself the guardianship of the joint estate for the common benefit of all interested. The principle on which a receiver is appointed, in the case of a dissolution of partnership and a disagreement between the parties as to the present disposition of the joint estate, is, that each partner has an equal right to the possession and control of the partnership effects and business. In the mode of carrying out this principle, in cases of dissolution, there seems to be a difference between courts of equity in this country and in England. In England, even after a dissolution, a receiver is not of course; there must be some breach of the duty of a partner, or of the contract of partnership. In New York, however, the rule seems to be, that upon a bill filed by one partner to close up a dissolved partnership concern, it is a matter of course to appoint a receiver, if the parties cannot agree among themselves as to the disposition and control of the joint property.² Practically, this conflict of authority can produce but little embarrassment, because an application

¹ Purd. Dig. 442.

² *Marten v. Van Schaick*, 4 Paige, 479; *Law v. Ford*, 2 Paige, 310; *Harding v. Glover*, 18 Ves. 281; *Wilson v. Greenwood*, 1 Swanst. 481.

for a receiver will rarely be made, unless a breach of partnership duty exist; since, it is the manifest interest of a dissolved co-partnership, that its assets should be administered by one of the associates, instead of a public officer having no knowledge of or concern in the business.¹

§ 890. The court will also appoint a receiver on a bill for the dissolution of a subsisting partnership, before answer and final decree. Such a case, however, to authorize the appointment of a receiver, must be one which would authorize a decree for a dissolution; and where it is apparent that a dissolution will be decreed, on the ground of some breach of duty or contract, a receiver will be appointed. The grounds, among others, upon which a dissolution will be decreed and a receiver appointed, are, the insolvency of the copartnership;² the exclusion of the complainants from their full share in the management of the concern; the neglect of the defendant, being the active partner, to keep perfect books of account; and his refusal to keep his books and accounts free and open at all times to the inspection of the com-

¹ *Gowan v. Jeffries*, 2 Ash. 303-4. See *Holden's Administrators v. M'Makin*, 1 Pars. 285.

² In New York, when a limited partnership becomes insolvent, its assets are considered a trust fund for the benefit of the creditors generally; and if the insolvent partners neglect to place the partnership effects in the hands of a proper and responsible trustee, to be distributed, without delay, among all the creditors of the firm, other than the special partner, rateably in proportion to the amount of their several debts, either due or to become due, any creditor may file a bill in behalf of himself and the other creditors of the firm; and may have a receiver appointed to distribute it among the several creditors who may come in and prove their debts under the decree to be obtained on such bill. *Innes v. Lansing*, 7 Paige, 583-4. The gist of the motion, in such case, consists in the fact that the co-partnership property is held by insolvent hands. *Edw. on Receivers*, 562; *Bloodgood v. Clark*, 4 Paige, 574. In Pennsylvania, however, a court of equity has refused to appoint a receiver of the effects of a special partnership, on the ground that a creditor of the firm was about to obtain judgment for a large amount, and to issue execution, whereby he would obtain a preference. *Beebe v. Boswell*, *Purd. Dig.* 544 n. See form of such a bill in the Appendix.

plainants. The exclusion of a partner from his full share of management, has always been held to be the strongest ground for appointing a receiver.¹

§ 891. The same rules which prevail respecting the appointment of a receiver in a suit between partners, are, in general, applicable to a suit between the representative of a deceased partner and the surviving partner. The rule laid down by courts of equity on this subject, seems to be this: the surviving partner having, at law, the right to the care, custody, and management of the joint estate, a court of equity will not, generally speaking, on a bill being filed against him for an account of the partnership transactions, deprive him of his legal right, by appointing a receiver, because, notwithstanding the death of one, the confidence in the other remains. But if he be guilty of such acts of mismanagement and improper conduct as satisfactorily prove that he cannot be intrusted with the joint estate, the court will then exercise its power, and appoint a receiver to collect in the debts and dispose of the property.²

§ 892. The court has no jurisdiction to appoint a receiver, unless a cause be pending; and when it is intended to apply to the court for such appointment, it is usual to insert in the prayer of the bill a request, that the court will, if necessary, appoint a receiver: this, however, is not absolutely requisite, and if the facts of the case authorize it, the court will appoint a receiver, although there be no prayer to that effect in the bill; indeed, the necessity for the appointment frequently occurs after the bill has been filed, so that it could not have been part of the prayer, and the court will, nevertheless,

¹ *Gowan v. Jeffries*, 2 Ash. 304-6.

² *Holden's Administrators v. M'Makin*, 1 Pars. 284.

make the order, without requiring the bill to be amended, or a supplemental bill to be filed.¹

§ 893. The application for a receiver may be by petition, but it is usually made by motion, of which notice must be given: a receiver may also be appointed by decree. Strictly speaking, a receiver can only be appointed after answer; but this rule is dispensed with, whenever the justice of the case requires it, and the merits appear by affidavit, and the court will not only appoint a receiver before answer, but will, in cases of emergency, entertain the application before appearance.² As a general rule, a receiver will not be appointed without notice to the parties interested; but even this rule has its exceptions, for the court will appoint without notice, where irreparable injury would be occasioned by the delay. The defendant, however, after such an appointment, can apply to the court for relief against the order, which will be superseded on satisfactory cause shown.³

§ 894. Where the application for a receiver is made before answer, it must be supported by affidavits verifying the facts which are relied upon by the party making it: after answer, the plaintiff can only rely upon the admissions in the answer. But where the answer is filed after notice of a motion for the appointment of a receiver, the practice is, to allow the affidavit of the plaintiff to be read, and to look upon the answer as a counter-affidavit. And so where one defendant only, of two material defendants, had answered, the plaintiff was permitted to read his affidavit in support of the application, and the answer of the defendant which had come in was treated as an affidavit.⁴

¹ 3 Dan. Ch. Pr. 1973-4.

² Ibid. 1974-5.

³ *Gowan v. Jeffries*, 2 Ash. 307; *People v. Norton*, 1 Paige, 17; *Gibson v. Martin*, 8 Paige, 481.

⁴ 3 Dan. Ch. Pr. 1976.

§ 895. According to the English practice, the order, when made, usually refers it to the master to appoint a proper person to be receiver, either of the rents and profits of the estate, &c., mentioned on the pleadings, or of the outstanding personal estate and effects of the testator, or of the partnership firm in the pleadings mentioned, (as the case may be) and to allow him a proper salary for his care and pains therein; the person to be appointed, first giving security to be approved of by the master, duly and annually to account for and pay what he shall so receive, as thereafter directed, or as the court shall appoint.¹ Our courts, however, have not adopted the practice of referring the appointment to a master, but will receive directly the proposals of the parties, of suitable persons for receivers, and will act directly upon such proposals.²

§ 896. When a receiver has been appointed of lands and tenements, his duty is to obtain possession of such of the estates as may be in the hands of any of the parties to the cause, and to obtain the attornment of the tenants of such of them as may be let. If he be unable to accomplish this, by reason of the refusal of the party to deliver up possession of the estate, or of the tenants to attorn, he must report such refusal to the solicitor of the party on whose application the order for the receiver was made, in order that he may take the necessary steps to put the receiver into possession, or to procure the attornment of the tenants.³ A defendant, who is the owner and occupier of an estate subject to a charge which the suit seeks to enforce, will be compelled to attorn to a receiver, and a reference will be directed to a master to fix an occupation rent.⁴

¹ 3 Dan. Ch. Pr. 1976-7.

² *Gowan v. Jeffries*, 2 Ash. 307.

³ 3 Dan. Ch. Pr. 1987-8.

⁴ *Everett v. Belding*, 15 Eng. L. & Eq. R. 354.

CHAPTER XXV.

PAYMENT OF MONEY INTO COURT.

§ 897. ONE of the most ordinary methods by which the court enforces its jurisdiction of preserving property in dispute, pending a litigation, is by ordering the fund to be paid into court. The payment of money into court is most usually ordered on interlocutory application, in the case of personal representatives, or other persons filling the characters of trustees, having money in their hands which belongs either wholly or in part to the plaintiff. Upon this principle, the court has ordered an auctioneer to pay into court the balance of a deposit upon a sale, admitted by him to be in his hands, after deducting his claims as auctioneer. So also, where an executor admits a sum of money to be due from him, in his individual character, to his testator, the court will order the amount to be paid into court.¹

§ 898. In order to induce the court to direct the immediate bringing in of a sum of money, upon an interlocutory application, the money must be clearly trust money; where it is not impressed with a trust, but is in the nature of a mere debt, the court will not make an order for the payment of it into court till the hearing of the cause. It is not necessary, however, to induce the court to order trust money to be paid in, that the trust should

¹ 3 Dan. Ch. Pr. 2010-12.

be one absolutely declared; it will, in many cases, do the same where the trust is only implied; as in the case of vendors and purchasers, in which case, as the court considers what is agreed to be done, as done, it will treat the vendor as a trustee for the purchaser of the estate contracted for, and the purchaser as a trustee for the vendor, of the purchase money; and therefore, a purchaser in possession of the estate may, upon motion, be ordered to pay the purchase money into court.¹

§ 899. The rule upon this subject is thus stated by Sir Edward Sugden: "1. Where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course: but, 2. If the possession by the purchaser without payment of the money is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership; for example, cutting timber by which the property is lessened in value, or selling the estate by which the first seller's remedy is complicated without his assent; in such cases, the court will interpose and compel the purchaser to pay the purchase money into court."²

§ 900. In regard to compelling the payment into court of money constituting partnership property, as the rule is, that he who seeks equity must do equity, it seems clear that where the plaintiff is a private debtor to the partnership, he cannot insist upon an account, without paying the amount of his debt into court. Upon similar principles, it would seem, that if the defendant aver by his answer, that a specific sum is due by the plaintiff to the partnership as a private debt, that sum must be paid into court by the plaintiff before an account will be de-

¹ 3 Dan. Ch. Pr. 2014.

² 1 Sugd. on Vendors, 248-9.

creed.¹ But one partner, whether plaintiff or defendant, may receive *partnership* money and effects, and insist on not paying in the amount unless all the other partners will pay in what they have in their hands; and *à fortiori*, if a partner, *as partner*, receive money belonging to the firm, and admitting that he has received it, insist that there is a balance in his favour, there is no pretence for making him pay it in.²

§ 901. A payment of money into court, upon an interlocutory application, does not alter the rights of the parties interested in the fund: the only instance in which the payment into court will affect the right of the parties, is where money due to a wife is paid into court in a suit to which the husband and wife are parties, which will have the effect of depriving the wife of her right by survivorship, unless the payment be into the joint names of the husband and wife.³ Such effect, however, would not result in this state from a payment of the wife's money into court, since the passage of the act of 1848 to protect the rights of married women.

§ 902. Applications for the payment of money into court should be made by special motion, of which notice must be given, and they are most commonly made after the answer has come in; but they are not unfrequently made after decree, on admissions upon proceedings under or before a master; and may in some cases be made before answer; such cases, however, are very rare: in general such an order will not be made before answer filed, except upon the ground of fraud.⁴

§ 903. To support an application for the payment of money into court, upon the answer, there must be a clear

¹ Collyer on Part. 165.

² Ibid. 2019-20.

³ 3 Dan. Ch. Pr. 2019.

⁴ Ibid. 2021, 2024.

admission by the answer, of the plaintiff's title : nor will the plaintiff be allowed, in such a case, to make use of affidavits to supply the defect in the answer, the rule of the court being, that the order shall be made upon the defendant's admission alone. This rule, however, must be understood as applying to proof of the plaintiff's title ; for it has frequently been decided, that though the court will not, upon applications of this sort, allow affidavits to be read in support of the plaintiff's title, it will receive affidavits to verify collateral facts ; thus, upon a motion that a purchaser may pay his purchase money into court, it will allow affidavits to be read, to prove that he has exercised acts of ownership.¹

§ 904. It must also appear to be admitted, either in the answer or the schedules annexed to it, that there is a balance actually in the hands of the defendant. It is not, however, necessary, that the actual amount of the balance should be stated, either in the answer or on the schedule ; if the answer contain a schedule not cast up, the sums may be cast up, and, on affidavit of the amount of what appears to be due, the order will be made. The same indulgence which is allowed to a plaintiff, of verifying the amount of the balance admitted by the answer, will, in certain cases, be extended to the defendant ; and where an executor admits, in his answer, that he has received a specific sum belonging to the testator's estate, but adds that he has made payments on account of the estate, the amount of which he does not specify, the court will allow him to verify the amount of his payments by affidavit, and then order him to pay the balance into court.²

¹ 3 Dan. Ch. Pr. 2021.

² Ibid. 2022-3.

CHAPTER XXVI.

PRODUCTION OF DOCUMENTS.

§ 905. IT is the constant practice of courts of equity, before the hearing of a cause, to allow a plaintiff to move for the production of documents relative to the matters in question, which have been admitted by the defendant's answer to be in his possession or power. This power to order the production of documents, arises out of that general jurisdiction for the purpose of discovery, which in all proceedings in equity constitutes a peculiar and important feature, and, in some instances, forms as it were the very foundation for the interference. This subject has already been considered, so far as relates to the right of the plaintiff to inspect documents referred to in the answer of the defendant;¹ and we will here briefly examine the rules of practice regulating applications for their production.

§ 906. As a general rule, the plaintiff must be able to read from the answer an admission that the documents, for which the motion is made, are at that time in the defendant's possession; the fact cannot be established by affidavit. If the documents be in the hands of an agent of the defendant, against whom the motion is made, the principle of the court is, that the possession of the agent is the possession of the defendant himself. It seems,

¹ Ante, § 680-1.

however, to be necessary, that the person in whose custody the documents are, should hold them exclusively for the defendant; for where the person who holds them is the agent of other persons as well as the defendant, against whom the motion is made, no order can be made for their production. But this principle does not extend so as to exonerate a defendant from making a discovery of any knowledge he may be able to obtain, by inspecting documents in the joint possession of himself and others.¹

§ 907. The plaintiff having shown that the answer contains a sufficient admission of the possession of documents, it is next incumbent upon him to show that they are sufficiently described so as to enable the court to make an order for their production. As the want of a proper description of documents, admitted to be in the defendant's possession, precludes the plaintiff from moving for their production; such a defect in itself renders the answer insufficient. Consequently, when the answer does not describe the documents the plaintiff may wish to inspect, the proper course for him to adopt is, to except to the answer, before making a motion for production.²

§ 908. The next subject for investigation is, the nature of the plaintiff's right to the documents themselves, or his interest in inspecting them; for the defendant may object to the production, upon the ground that such right or interest is not shown. The defendant may also urge special grounds of exemption as reasons why the motion should not be granted; the *onus*, however, of proving *such* objections to the required discovery rests upon the defendant.³

§ 909. In general, the plaintiff's right or interest in the documents is sufficiently established by an unqualified

¹ 3 Dan. Ch. Pr. 2041-2.

² Ibid. 2044-5.

³ Ibid. 2045.

admission by the defendant, that they are relevant to the plaintiff's case; but this admission may be accompanied by statements in the answer tending to establish, either that the plaintiff has not that right or interest in the documents which entitles him to their production, or that the defendant has some special grounds for protection. If such qualifying statements contain an entire denial of the plaintiff's title to maintain the suit, a discovery of the documents admitted to be in the defendant's possession will not be granted, until the plaintiff has established his title.¹ Nor is this principle in any way affected by the rule that a defendant who submits to answer must answer fully; for, as we have seen, a defendant may, according to our practice, by his answer, deny the principal fact, upon which the equity of the plaintiff's bill is founded, and decline making any discovery consequent upon the equity so denied.²

§ 910. As we have already considered, in the chapter on discovery, the nature of the objections which may be specially urged to making the discovery called for by the plaintiff's bill, it is only necessary here to observe, that the same reasons may be objected to the production of documents admitted to be in the possession of the defendant. The one most commonly urged is, that the required documents relate exclusively to the defendant's title and not to the plaintiff's case; for if they relate both to the plaintiff's case and also to the defendant's, then, it seems, that, even though they be the very foundation of the defendant's title, still they must be produced.³

§ 911. A motion for the production of documents must be made upon notice, and is subject to the ordinary rules

¹ 3 Dan. Ch. Pr. 2046-7.

² *Perry v. Kinley*, 3 Am. L. R. 183.

³ 3 Dan. Ch. Pr. 2052.

affecting special motions. There does not seem to be any period of the cause, after the filing of the answer, when such a motion cannot be made. The order usually directs the documents to be left with the prothonotary, and it would appear that the court will never order production at any other place, except upon the consent of the person in whose possession they are. Upon the application, however, of the defendant, the court will frequently order production at some other place, for the sake of convenience.¹

§ 912. If the defendant state, by affidavit, that certain portions of the documents required to be produced, do not relate to the matters in question, leave will be given him to conceal them; in such case the order will be qualified in the following manner: "but the said defendant is to be at liberty to seal up such parts of the said books as, according to an affidavit to be previously made, do not relate to the matters in question in this cause." In a case of this kind, even though there be strong grounds for suspecting that the defendant has sealed up matter that ought to have been disclosed, the court is concluded by the oath of the defendant from giving further discovery. If, however, the defendant's affidavits contain statements at variance with each other, or if the document itself show a discrepancy in his statements, it seems, that it would be quite consistent with the rules of the court to get at the truth by compelling the party to give the discovery.²

§ 913. The effect of an order against a defendant for the production of documents, is only to give the plaintiff the power of inspecting and taking copies of them. It does not make the documents evidence in the cause,

¹ 3 Dan. Ch. Pr. 2064.

² Ibid. 2066.

unless the mere circumstance of their coming out of the custody of the defendant would, in itself, render them admissible evidence. If, therefore, the plaintiff wish to have them proved in the cause, or to have them produced at the hearing, it is necessary that he should procure an order to that effect. When, however, a document has been produced by the defendant, for the purpose of enabling the plaintiff to have it proved as an exhibit in the cause, then he is bound to have it in court at the hearing, without any direct order against him for its production.¹

§ 914. As a general rule, when discovery from the plaintiff, either concerning matters of fact, or the contents of documents, is necessary to a defendant, for the purpose enabling him to complete his defence to the case sought to be established against him, he can only obtain such discovery by means of a cross-bill. Upon such a bill being filed, the plaintiff in the original suit, in his character of a defendant to the cross-bill, becomes liable to the application of the same rules concerning the production of documents, as a defendant in any other case. An answer to a cross-bill cannot, however, in general be obtained, until the original bill has been fully answered; and not only must a full answer, in the ordinary sense of the term, be placed upon the record, before an answer to the cross-bill can be enforced; but the plaintiff in the original suit will be allowed time to answer the cross-bill, until after the defendant has complied with an order for production of deeds in the original suit.²

¹ 3 Dan. Ch. Pr. 2067-8.

² Ibid. 2069.

CHAPTER XXVII.

ORPHANS' COURT.

§ 915. THE orphans' court is a court of record, holden in each county of the state by the judges of the court of common pleas. Its jurisdiction extends to and embraces the appointment, control, removal, and discharge of the guardians of minors, and the settlement of their accounts; the removal and discharge of executors and administrators deriving their authority from the register of the respective county, and the settlement of their accounts; the distribution of the assets, and surplusage of the estates of decedents, after such settlement, among creditors,¹ and others interested;² the sale and partition

¹ It was said, ante § 151, that a creditor could not go into the orphans' court to recover his debt against a solvent estate; but whilst these pages have been passing through the press, the case of Gochenaur's Appeal, 3 Am. L. R. 486, has appeared, in which this doctrine is overruled; and it is now determined by the supreme court, that under the act 13th April 1840, Purd. Dig. 211, the orphans' court has jurisdiction of a disputed claim against the estate of a decedent, whether it be solvent or insolvent. And see Heitler's Estate, 3 Am. L. R. 487 n; Kittera's Estate, 5 Harris, 416; Whiteside v. Whiteside, 8 Harris, 474. The same point was decided in Bull's Appeal, 17 May 1855. MS.

² In a proceeding before the orphans' court for the distribution of the assets of the estate of a decedent, the parties beneficially interested in the fund are recognised as having a standing in court; and therefore, where the fund is insufficient for the payment of all demands against it, each creditor has the right to oppose any other claimant, by showing payment of the debt, or that it is barred by the statute of limitations, or that the lien has expired (if the claim be upon a fund arising from the sale of real estate,) or that any other defence exists against it; and these rights do not depend upon the will of the personal representative of the decedent. Kittera's Estate, 5 Harris, 423.

of the real estate of decedents; the specific execution of contracts made by decedents, to sell and convey any real estate of which such decedent dies seised; proceedings for the recovery of legacies;¹ and all cases within the respective county, wherein executors, administrators, guardians, or trustees, may be possessed of, or are in any way accountable for any real or personal estate of a decedent.²

§ 916. The orphans' court is sometimes called a court of *limited* jurisdiction. This is true, if regard be had to the derivation of its powers, for it possesses none inherently, and exercises such only as are conferred by or implied from legislation; and it is true also as to the subjects of its jurisdiction, for these are set down in the statutes; but, within its appointed orbit, its jurisdiction is exclusive, and therefore necessarily as extensive as the demands of justice.³ The orphans' court, in matters within its jurisdiction, proceeds on the same principles as a court of chancery;⁴ it is essentially such in its proceedings and decrees, within the limited sphere of its jurisdiction.⁵ But although the orphans' court has been called a court of equity in respect to the few objects within its jurisdiction, the ancillary powers of such a court have not been given to it. It is a special tribunal for specific cases; and its resemblance to a court of equity consists in its practice of proceeding by petition and answer, con-

¹ It has been said, that under the act 24th February 1834, the orphans' court has no jurisdiction, unless a legacy be charged on or payable out of real estate. Galloney's Appeal, 6 Barr, 37; Mittenberger v. Schlegel, 7 Barr, 243. But it does not appear to have been considered, whether such jurisdiction be not conferred by the act 16th June 1836, which gives jurisdiction to the orphans' court, generally, of all proceedings for the recovery of legacies, without limitation.

² Purd. Dig. 620-1.

³ Shollenberger's Appeal, 9 Harris, 341.

⁴ Guier v. Kelly, 2 Binn. 299.

⁵ Commonwealth v. The Judges, 4 Barr, 303; Kittera's Estate, 5 Harris, 423.

taining the substance, but not the technical subtleties and nice distinctions of a bill in equity; by which, however, justice is obtained more conveniently, and as certainly, as in courts of equity purely so called. As the orphans' court, therefore, has not the general powers of a court of equity, it cannot entertain a bill of discovery; but it can reject an answer to a petition.¹

§ 917. The statutes which define the jurisdiction of the orphans' court, and direct the mode of its exercise, had it not in view to cumber the proceedings of the courts with the elaborate forms of equity pleading, or to require the niceties which time has introduced into the forms used in chancery.² In conducting the business of our statutory courts, we may profitably consult the practice which obtains in the purely equitable tribunals, and the reasons that have led to its adoption. But this does not necessarily involve the self-imposition of shackles that *there* sometimes fetter the arms of justice, by sacrificing truth to technical rule. The object should be, just to retain so much of form as is necessary to the right understanding and conduct of the cause, and to adopt the precepts that regulate the modes of procedure, so far as these contribute to the furtherance of right and the suppression of wrong.³

§ 918. The manner of proceeding in the orphans' court, to obtain the appearance of a person amenable to its jurisdiction, and to compel obedience to its orders and decrees, is as follows: on the petition to the court of any person interested, whether such interest be immediate or remote, setting forth the facts necessary to give the court jurisdiction, the specific cause of complaint, and the re-

¹ Brinker v. Brinker, 7 Barr, 55.

² Johnson's Appeal, 9 Barr, 419.

³ George's Appeal, 2 Jones, 261. See Sheaffer's Appeal, 8 Barr, 43-4.

lief desired, and supported by oath or affirmation, the court, or any judge thereof, in vacation, is required to award a citation, returnable at a day certain, not less than ten days after the issuing thereof.¹

§ 919. Although the orphans' court is not controlled by the rules of pleading which have been established in courts of purely equitable jurisdiction, a proper limited regard to form is not dispensed with by the act defining its course of procedure.² It must not only appear from the facts set forth in the petition, that the orphans' court has jurisdiction of the cause of complaint, but that the *relief* desired is such as the court has power to grant in the manner and form prayed for.³ It must also make the proper parties interested defendants in the suit; thus, to a petition praying a sale of land for the payment of legacies, the terre tenants, grantees of a devisee of the land, charged with the payment of the legacies, are necessary parties;⁴ the court, however, acting on the principles of a court of chancery, will disregard forms, by striking out or adding parties, if necessary, to reach the justice of the cause.⁵ It is also necessary that the petition should be supported by oath or affirmation: without it, no citation or process can legally issue.⁶ But when the subject of the petition is clearly within the jurisdiction of the court, and presented in proper form, a citation is as much a matter of right, as a subpoena is in chancery.⁷

§ 920. The citation may be served by the party obtaining the same, or by any authorized agent, or if re-

¹ Purd. Dig. 622.

² Johnson's Appeal, 9 Barr, 419.

³ Cohen's Appeal, 2 Watts, 177. But see Brinker v. Brinker, 7 Barr, 56, where it is said, that a prayer for general relief is sufficient.

⁴ Jenkins v. Jenkins, 7 Barr, 246.

⁵ Downer v. Downer, 9 Barr, 303.

⁶ Darrach's Estate, 4 Penn. L. J. 247-8. ⁷ Smith v. Black, 9 Barr, 308-9.

quired by the party, it must be served by the sheriff or coroner, as the case may require, of the proper county. The manner of service is directed to be, by giving a copy thereof to the defendant personally, or by leaving such copy with some member of his family at his last place of abode. If the defendant be not found, and have no known dwelling place within the county,¹ such citation may be served, in like manner, upon the person or persons who may be the surety or sureties of such party, in any bond or recognisance given by him for the performance of any trust or duty in respect to which such citation may have issued. The return to a citation, if made by the party on whose petition it issued, or his agent, must be on oath or affirmation; and in all cases of service, the return must state how such citation was served.²

§ 921. If the party to be cited cannot be found, and have no known dwelling-place within the commonwealth, and there be no surety on whom service of the citation can be made, and the facts be so stated in the return, on oath or affirmation, by the party complaining, or by some one competent to make affidavit in that behalf, the court may award another citation, returnable in like manner with the first; and, at the time of awarding such

¹ The act 27th March 1854 provides, that in all cases where executors, administrators, assignees, or other trustees, shall not reside within the jurisdiction of the court having control of their accounts, proceedings may be held, and suits may be brought against them, by creditors and others interested in said estates, in the counties where such accounts are to be settled; and process may be served by the proper officers of said counties, or their deputies, on said executors, administrators, assignees, or other trustees, beyond the bounds of said counties, as if they resided therein, or upon any surety on their official bonds, with like effect as if they resided within the jurisdiction of the courts having control of their accounts. *Purd. Dig.* 1101.

² *Ibid.* 622.

second citation, may make an order for publication of the same in two or more newspapers, to be designated by the court, in such place or places, and for such length of time as the court, having regard to the supposed place of residence of the defendant, and other circumstances, shall direct.¹

§ 922. In all cases in which heirs, legatees, or distributors, are interested, and in consequence of such interest, notice is required to be given to them, or any of them, of any proceedings in the orphans' court, such notice is directed by statute, in all cases, to be given in the following manner, except in cases otherwise specially provided for, namely: to all persons resident within the county in which the court has jurisdiction, notice shall be given personally, or by writing left at their place of abode: to all persons resident without the county, personal notice shall be given, in like manner, if in the opinion of the court, such notice be reasonably practicable: if otherwise, by publication in such one or more newspapers, as in the opinion of the court, will be most likely to meet the eye of those entitled to notice.²

§ 923. In all cases in which the proceedings in the orphans' court, affect the interest of any minor, notice of such proceedings must be given to the guardian of such minor, if resident within the county, or within forty miles of the seat of justice, in the same manner as provided for in the case of resident persons of full age; but if such minor have no guardian, it is the duty of the party making the application to the orphans' court, to cause notice of such application to be given to the minor, if above the age of fourteen years, or, if under that age, to his next of kin of full age, provided such minor or next of kin reside within the county, or within

¹ Purd. Dig. 622.

² Ibid. 621.

forty miles of the seat of justice thereof; and if, at the next session of the court, application be not made on the part of such minor, praying for the appointment of a guardian, then it becomes the duty of the court to appoint a suitable person as guardian, on whom notice must be served in all cases in which notice shall be requisite.¹

§ 924. At the time appointed for the appearance of the defendant, should he not appear, according to the requisition of the citation, and if due proof be made of the service thereof, or when service cannot be made, of the publication thereof as prescribed by the act of assembly, the court may, with or without another citation, as justice may require, proceed to make such order or decree in respect to the subject matter as may be just and necessary. The court may also, on such proof, order the petition of the complainant to be taken as confessed, and direct a reference to an auditor or auditors to take proof of the facts and circumstances set forth in the petition, and to report thereon; and also to report an account against the defendant, if necessary; and on the report of the auditor or auditors, the court may make such order or decree thereon as may be just.² It is irregular to make a decree for the removal of a guardian, upon taking the petition *pro confesso* against him, merely because he neglects or refuses to answer: all the court can do in such case is, to proceed *ex parte*, and judge how far the complaint is sustained by the evidence on the part of the petitioner.³ Neither can a decree safely be obtained against an infant, upon the mere fact of taking the bill *pro confesso*, or upon an answer in form by the guardian *ad litem*. The answer

¹ Purd. Dig. 622.

² Ibid.

³ Shilling's Appeal, 1 Barr, 90.

in such cases generally is, that the infant knows nothing of the matter, and therefore neither admits nor denies the charges, but leaves the plaintiff to prove them as he shall be advised, and throws himself upon the protection of the court. A decree upon such an answer would not bind the infant, and he can open it or set it aside when he comes of age. No laches can be imputed to an infant, and no valid decree can be made against him merely by default.¹

§ 925. The orphans' court, or any auditors appointed by them, have power to examine on oath or affirmation, any of the parties to any proceedings instituted in such court, respecting any matters in dispute in such proceedings;² such examination, however, can only be at the instance of the opposing party;³ and if one party call and swear the other, the oath must be taken for true, unless it be clearly disproved: this is the general rule in equity.⁴ The court may also compel the production of any books, papers, or other documents, necessary to a just decision of the question before them, or before auditors.⁵

§ 926. The court may likewise send an issue to the court of common pleas of the same county, for the trial of facts by a jury, whenever it deems it expedient so to do.⁶ Such issue, however, ought to state the specific facts to be tried; since many errors, as well as great injustice, must necessarily grow out of not stating the fact or facts contested between the parties specifically, and making the precise points of the issue or issues which are to be settled by a jury. It would be well if the same

¹ *Rogers v. Smith*, 4 Barr, 100-1.

² *Purd. Dig.* 624.

³ *Mylin's Estate*, 7 Watts, 67.

⁴ *Light's Appeal*, Supreme Court, 18 December 1854. MS.

⁵ *Purd. Dig.* 624-5.

⁶ *Ibid.* 624.

precision and minuteness were to be observed in these issues directed by the orphans' court to settle an administration account, as is required in forming an issue before auditors in an action of account render. If this course were observed, every thing that is admitted and agreed on between the parties litigant, would be excluded, by the form and terms of the issue or issues, from the consideration of the jury, and leave no ground for mistake or misapprehension afterwards of what was tried, and the extent of the liability under the finding of the jury.¹

§ 927. Before an issue is directed upon the distribution of money arising from an orphans' court sale, the applicant for such issue must make affidavit, that there are material facts in dispute therein, and set forth the nature and character thereof; upon which affidavit the court is to determine whether such issue shall be granted, subject to an appeal by the applicant in case of refusal of the issue demanded.² It is not sufficient, in order to obtain an issue, to allege that there is a dispute about certain facts, or that there are certain facts in dispute; the party must, at least, to the best of his knowledge and belief, allege the existence of certain facts material to the matter in question, and that the truth of those facts is disputed by other persons; or that certain facts are alleged by the other party, which, to the best of his knowledge and belief, do not exist and are disputed by him.³ A fact is properly said to be in dispute, when it is alleged by one party and denied by the other, and by both with some show of reason. A mere naked allegation, without evidence, or against the evidence, cannot create a dispute within the meaning of the statute.⁴

¹ *Rife v. Galbreath*, 3 Penn. R. 208.

² *Purd. Dig.* 624.

³ *Brinton v. Perry*, 10 Leg. Int. 102.

⁴ *Knight's Appeal*, 7 Harris, 494.

§ 928. Upon the granting of such an issue, it is discretionary with the court, as soon as the money arising from such sale shall have been paid into court, upon the application of the party or parties appearing by the record *primâ facie* entitled to the fund, to order the same to be invested *pendente lite*, in the debt of the United States or some other sufficient security, subject to the decree of the court.¹

§ 929. The orphans' court being a court of record, its proceedings and decrees, in matters within its jurisdiction, are not liable to be reversed or avoided collaterally in any other court.² The only cases in which the decree can be questioned, in a collateral proceeding, are those in which fraud can be clearly established, (and then, like all other proceedings of courts of every character, their judgments and decrees must give way and be dissolved by the taint,) or where the want of jurisdiction appears on the face of the proceedings.³ Such decrees may, however, be reversed, modified, or altered, on appeal to the supreme court.⁴

§ 930. Compliance with an order or decree of the court may be enforced by attachment or sequestration; or, in case of a decree for the payment of money against a party who has appeared, the complainant may have a writ of execution in the nature of a writ of *feri facias*, which writs are allowed by the court, or any judge thereof, in vacation.⁵ A writ of *feri facias* may be awarded in favour of a guardian, to whom his ward's estate has been found indebted on a settlement of his accounts.⁶ Such writ is to be directed to and executed by the sheriff or

¹ Purd. Dig. 624.

² Ibid. 620.

³ Lockhart v. John, 7 Barr, 139.

⁴ Purd. Dig. 620.

⁵ Ibid. 622.

⁶ Shollenberger's Appeal, 9 Harris, 337.

coroner, as the case may be, of the proper county; and the proceedings thereon are the same as on writs of *feri facias* issued by a court of common pleas. The court may also issue writs of *venditioni exponas*, and writs of *testatum fieri facias* and *venditioni exponas*, with the like effect as if issued by a court of common pleas.¹

§ 931. Writs of attachment and sequestration are also to be directed to and executed by the sheriff or coroner of the proper county. The following form for the writ of sequestration is prescribed by statute, viz.: "The Commonwealth of Pennsylvania: To the sheriff of the county of ———, greeting: Whereas A. B." (here set out the decree, or so much thereof as is material to explain the duty to be performed.) "Therefore, we command you, that you do, at proper and convenient hours in the day time, go to and enter upon all the messuages, lands, tenements, and real estates of the said A. B., and that you do collect, take, and get into your hands, not only the rents, issues, and profits of all his said real estates, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands; and also that you attach all stocks held by him in incorporated companies, and keep the same under attachment; until our said orphans' court shall make order to the contrary: and you are to return with this writ an inventory or schedule of the property you have sequestered or attached, and a certificate under your hand of the manner in which you shall have executed this writ, to our said court, on the ——— day of ——— next: Witness, &c."²

§ 932. It is the duty of the sheriff or coroner, as the case may be, immediately after receiving any such writ

¹ Purd. Dig. 622-3.

² Ibid. 623.

of sequestration, to file a copy thereof in the office of the prothonotary of the court of common pleas of the same county, who is required forthwith to enter the substance of it on his docket, with the names of the parties; and such entry thenceforward operates to charge the real estate of the defendant, according to the form and effect of the writ, and binds the same in the hands of all purchasers and mortgagees, subsequently to such entry, without other notice. If, however, such sequestration be dissolved by order of the orphans' court, the defendant or any person interested in such real estate, may have a certificate of the same from the clerk of the said court, which it is the duty of such clerk to furnish on application, and which, being entered on the docket, will operate as a satisfaction of the lien. A sequestration does not abate by the death either of the complainant or defendant.¹

§ 933. If proof be made, on oath or affirmation, to the satisfaction of the court, if in session, or to any judge thereof, in vacation, at the time of filing the petition, that the defendant has absconded, or is about to abscond, or depart from his usual place of abode, to the prejudice of the complainant, the court or judge may allow the issuing of a writ of attachment, or a writ of sequestration, or both, in the first instance, against such defendant; and on the return thereof, the like proceedings may be had as upon the return of a citation. But the court, or any judge thereof, in vacation, may dissolve such attachment or sequestration, when executed, upon the defendant giving security, to the satisfaction of the court, or of such judge, to appear on a day certain, to answer the petition, and to abide the orders and decrees of the court in the premises.²

¹ Purd. Dig. 623.

² Ibid.

§ 934. If proof be made, on oath or affirmation, to the satisfaction of the court, or of any judge thereof, in vacation, at the time of presenting a petition, or at any stage of the cause, that the defendant has in his possession trust property or effects, which he is wasting or otherwise disposing of, contrary to his duty and trust; or that he is about to abscond, and carry such trust property and effects out of the jurisdiction of the court; the court or judge may award a writ, in the name of the commonwealth, to the sheriff or coroner, as the case may require, of the proper county, returnable on a day certain, in the orphans' court, to be convened for that purpose if the court shall not be then in session, commanding him to take possession of all such trust property and effects, specified in such writ, and to hold the same subject to the order of the court; and also to attach all debts due to such trust, whether by bond, mortgage, or otherwise, and all stocks in incorporated companies; and serve a copy of such writ upon each debtor, and upon each company in which stock may be held belonging to the trust. Before the execution of such writ, the sheriff or coroner may require of the party at whose instance the same has been issued, sufficient security to indemnify him against all damages arising from the execution thereof. And if the party against whom such writ is issued, give sufficient security to the sheriff or coroner, that the trust property or effects specified in such writ shall be forthcoming at the return thereof, then the sheriff or coroner is not to execute the same, but to make return of the facts to the court.¹

§ 935. The like proceedings may be had, where the court has made a final order and decree, for the delivery

¹ Purd. Dig. 623.

of the trust property and effects, by the defendant, to any person who may be designated by law, or by the order of the court, to receive them; and on the return of such writ, the court may make such order respecting the disposition of such trust property and effects, as may be necessary and proper, according to the principles of justice and equity.¹

§ 936. When a decree is made against a defendant who has not appeared to the citation, and a sequestration has issued against the real or personal estate of such defendant, the court may order the decree to be satisfied out of the estate and effects sequestered. But such order will not be carried into execution, until the complainant have given security, to the satisfaction of the court, to abide the order of the court, touching the restitution of what he may have received, in case the defendant shall appear, and be admitted to defend the suit; and if such security be not given, the estate and effects sequestered, or the proceeds thereof, will remain subject to the directions of the court, to abide its further order.²

§ 937. If a defendant, against whom such decree has been made, or his representatives, shall, within one year after personal notice of such decree, and within five years after the entry thereof, when no such notice has been given, present a petition to the same court, praying to be admitted to be heard, and shall pay such costs as the court may adjudge, the party so petitioning is entitled to be admitted to a defence, and the case then proceeds in like manner as if such defendant had appeared in due season, and no decree had been made. If, however, such defendant, or his representatives, do not, within such period, present such a petition, then the court may make

¹ Purd. Dig. 624.

² Ibid.

such final order and decree, both in respect to any estate or effects that may have been sequestered, and in respect to the matters in controversy in the case, as may be according to justice and equity; and may, if necessary, award a writ in the nature of a writ of *feri facias*, in the manner provided where a defendant appears to the citation.¹

§ 938. If any executor, administrator, or guardian, shall reside or remove out of the county in which his appointment was made, or shall not possess real or personal estate in such county, sufficient to satisfy any decree or order of the orphans' court of such county, the said court may issue process to the county in which such executor, administrator, or guardian may be, or in which he may have any real or personal estate, amenable to such process, to be executed by the sheriff or coroner of the county to which such process may be issued.²

§ 939. If, within five years after the final decree, confirming the original or supplementary account of any executor, administrator, or guardian, a petition of review be presented by such executor, administrator or guardian, or their legal representatives, or by any person interested therein, alleging errors in such account, which errors must be specifically set forth, and the said petition and errors are verified by oath or affirmation; in such case it is provided, that the orphans' court shall grant a rehearing of so much of the said account as is alleged to be erroneous in the petition of review, and give such relief as equity and justice may require, by reference to auditors or otherwise; with like right of appeal to the supreme court, as in other cases, except that, in such case, the appeal shall be taken within one year after the decree

¹ Purd. Dig. 624.

² Ibid.

made on the petition of review. This statute, however, does not extend to any cause wherein the balance found due has been actually paid and discharged.¹

§ 940. The orphans' court has, from the beginning, exercised the power of reviewing and modifying its proceedings and decrees, as an authority necessarily inherent and essential to the right discharge of its duties. The act of 1840 is confined to reviews of alleged errors in the settled accounts of executors, administrators and guardians. It limits the period within which a review may be had in such cases to five years; but leaves untouched the pre-existing practice in all other instances.² To justify a bill of review, there must, however, either be error on the face of the account, or new facts arising since the decree, or newly discovered evidence.³ And it is indispensable that the mistakes or errors in the original decree which is sought to be opened, should be specifically set out in the petition of review.⁴

§ 941. Any person aggrieved by a definitive sentence or decree of the orphans' court, may appeal from the same to the supreme court. To obtain an appeal, the party appealing is required to give security, by recognisance, with sufficient surety, in the orphans' court, or before one of the judges thereof, conditioned to prosecute such appeal with effect, and to pay all costs that may be adjudged against him; and also to make oath or affirmation that the appeal is not intended for delay. An appeal, duly entered, stays all proceedings in the court below, until the same is determined in the supreme court

¹ Purd. Dig. 625.

² George's Appeal, 2 Jones, 262. See Downing's Estate, 5 Watts, 90; Clauser's Estate, 1 W. & S. 215.

³ Hildebeitel's Appeal, Purd. Dig. 625 n; Riddle's Estate, 7 Harris, 431.

⁴ Kachlein's Appeal, 5 Barr, 95.

and the record remitted to the orphans' court. No appeal, however, is allowed, unless the same be entered and security given within three years after the final decree of the orphans' court. A reversal or modification of a decree, for the sale of real estate, will not have the effect of divesting any estate or interest acquired under such decree or proceedings, by persons not parties thereto, where the orphans' court had jurisdiction of the case.¹

§ 942. On an appeal from the orphans' court, it is the duty of the supreme court to hear and determine the case upon the merits, and to decree according to the justice and equity thereof.² In such case the proceedings are *de novo*, and where the proof to establish a particular point seems defective, the supreme court may order the cause to stand over for further proofs;³ and for that purpose may refer the same to auditors, when in its discretion it may think proper.⁴ This, however, is entirely a matter of discretion, and the power will not be exercised, unless in case of a plain and palpable violation of the rules of equity and justice.⁵

¹ Purd. Dig. 625.

² Ibid.

³ Wallace's Appeal, 5 Barr, 107.

⁴ Purd. Dig. 625.

⁵ Hise's Estate, 5 Watts, 157; Mylin's Estate, 7 Watts, 66.

CHAPTER XXVIII.

AUDITORS.

§ 943. POWER is given to the orphans' courts to appoint auditors in the following cases: 1. Before the discharge of a guardian:¹ 2. To settle and adjust, in solvent estates, the accounts of executors, administrators, guardians, and trustees, when excepted to:² 3. Where such accounts have been confirmed, to report distribution:³ 4. To settle and adjust, in insolvent estates, the rates and proportions, and to report distribution:⁴ 5. To report on the expediency of granting an order for the sale or mortgage of the real estate of a decedent:⁵ 6. In proceedings in partition, to report as to the existence of liens and incumbrances, affecting the interests of the parties:⁶ 7. Where a petition has been taken *pro confesso* to take proof of the facts, and report thereon, and, if necessary, to report an account against the defendant.⁷ It is also customary to refer to auditors many other matters not specially provided for by any act of assembly.

§ 944. In general, it is the duty of an auditor, when requested, to report all the facts and inferences of facts that are necessary to sustain the conclusion at which he arrives. Except when appointed to report evidence, he does not perform his duty by returning the testimony

¹ Purd. Dig. 192.

² Ibid. 211.

³ Ibid.

⁴ Ibid.

⁵ Ibid. 201, 211.

⁶ Ibid. 209.

⁷ Ibid. 622.

taken by him, and the court does not look at the evidence, unless the report be excepted to for some facts specially alleged to be untruly found by the auditor.¹ Where evidence is offered and objected to, and he is desired to note it for the opinion of the court, he should distinctly state the offer and its purpose, and the objection thereto, and his ruling thereon. In some cases he may also state how the report should be, in case the evidence has been erroneously admitted or rejected by him. And it may be very proper in some cases to report the question of evidence to the court for decision, and suspend the proceedings until it be decided.²

§ 945. In stating an account he is not obliged to state the facts upon which he finds the several items to be correct, unless he be specifically requested so to do by the party objecting to the item: and no general request as to all or several items should be regarded. It is very proper for an auditor to aid the court by giving the reasons for his judgment, but when he does so, it is more regular to annex his opinion to, than to embody it in his report. He should take sufficient notes of all testimony taken before him, and annex the same to his report, unless where the practice of the court requires him to return the same for the inspection of the court, in case his report of facts be excepted to.³

§ 946. Every exception to an auditor's report should point specifically to the very error complained of, otherwise it cannot properly be noticed. General exceptions display a want of skill, and also imply that no particular error has been discovered. An excellent rule for securing a careful and well considered report, and preventing fri-

¹ Mengas's Appeal, 7 Harris, 222; Haines v. Burr, 7 Leg. Int. 54.

² Mengas's Appeal, ut supra.

³ Ibid.

volous exceptions, is the usual chancery rule, adopted by the supreme court, and by some of the subordinate courts; which is, that the auditor shall give the several parties ten days' notice that his report is ready for signing, that they may have an opportunity of excepting to it before him. If it be thus excepted to, he reconsiders, and, if necessary, amends his report before filing it, and no exceptions are noticed in the court that were not filed before the auditor. Thus no report can be set aside except on points to which the auditor's attention has been directed, and then the same point is distinctly presented to the court below, and reviewed by them.¹

§ 947. The court may review the report of an auditor on exceptions filed thereto, but cannot properly set aside or modify it, except for errors of fact or law specifically excepted to in proper time. For reasons that would justify the granting of a new trial by jury, the court should remand the case for rehearing and report to the same auditor; and if the rehearing be for reasons personal to the auditor, then another may be substituted in his place. The court will itself correct such palpable errors as arise from mere mistake of computation. Where facts have been found, and excepted to, the court, if it cannot approve the report, may, at the request of either party, order a jury trial, and then the very facts upon which the legal conclusion depends should be distinctly and severally stated in the issue, so that there can be no dispute as to what is to be found.²

§ 948. Where facts have been found by the auditor and approved by the court below, the case must manifest most flagrant error, in order to justify the supreme court in interfering with the report. Even on appeal, as dis-

¹ Mengas's Appeal, *ut supra*.

² *Ibid*.

tinguished from 'a writ of error, it cannot properly be called upon to try questions of fact.¹ The report of an auditor, like an award of referees, or verdict of a jury, determining upon facts, ought not to be set aside, except for plain mistake, which it is the business of the exceptant to establish by affirmative evidence.² It is entitled to the same respect as the verdict of a jury, and should not be set aside, unless it be wrong in law, or contain a plain mistake of fact.³

§ 949. The costs of an audit, unless the necessity for the reference were occasioned by the improper conduct of one of the parties, will, in general, be directed to be paid out of the fund. But in cases where there has been fraud or misconduct, the costs will be imposed upon the party in default:⁴ they must be borne by him who unnecessarily causes them.⁵

¹ Mengas's Appeal, *ut supra*; Loomis's Appeal, 10 Harris, 319; Quain's Appeal, 10 Harris, 510; Bull's Appeal, 17 May 1855. MS.

² Ludlam's Estate, 1 Harris, 190. ³ Patterson's Appeal, 11 Leg. Int. 150.

⁴ Harlan's Estate, 3 Penn. L. J. 117-8; Magaw's Appeal, Pittsburgh Leg. J. 17 February 1855.

⁵ Patterson's Appeal, 11 Leg. Int. 150.

APPENDIX.

EQUITY PRECEDENTS.

PARTS OF AN ORIGINAL BILL.

I. THE DIRECTION OR ADDRESS.

In the Supreme Court.

To the Honourable the Justices of the Supreme Court of Pennsylvania, sitting in Equity, in and for the Eastern district.

In a District Court.

To the Honourable the Judges of the District Court for the city and county of Philadelphia, sitting in Equity.

In a Court of Common Pleas.

To the Honourable the Judges of the Court of Common Pleas of the county of Philadelphia, sitting in Equity.

II. THE INTRODUCTION.

A. B., of the city of Philadelphia, merchant, brings this his bill against C. D. and E. F., of the said city; and thereupon your orator complains and says that, &c.

By a Married Woman.

A. B., of the city of Philadelphia, wife of C. D., of the said city, gentleman, by E. F., her father and next friend, brings this her bill against the said C. D. and G. H., of the said city; and thereupon, &c.

III. THE STATING PART.

Conclusion of the stating part, (after narrating the facts of the plaintiff's title, or ground of his complaint.) And your orator well hoped that no disputes would have arisen touching the said, &c., (*stating*

the subject matter,) but that the said defendant would have complied with the reasonable request of your orator, as in conscience and equity he ought to have done.¹

IV. THE CONFEDERATING PART.²

But now so it is, may it please your honours, that the said defendant, combining and confederating with divers persons, at present unknown to your orator, whose names, when discovered, your orator prays he may be at liberty to insert herein, with apt words to charge them as parties defendants hereto; and contriving how to wrong and injure your orator in the premises, he the said defendant absolutely refuses to comply with such request; and he at times pretends that (*here follows the statement of the defendant's supposed ground, on which he avoids the plaintiff's claim, and this should be matter disproved or traversed in the charging part of the bill.*)

V. THE CHARGING PART.³

That the said defendant sometimes alleges and pretends (*stating the supposed ground of the defendant;*) and at other times he alleges and pretends, &c., whereas your orator charges the contrary thereof to be the truth, and that (*stating the special matter with which the plaintiff meets the defendant's supposed case.*)

VI. THE JURISDICTION CLAUSE.⁴

All which actings, doings, and pretences of the said defendant, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is wholly remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable: To the end, therefore, &c.

VII. THE INTERROGATING PART.

To the end, therefore, that the said defendants may, if they can,

¹ This part may include, by way of statement and counter-statement, what is supposed to be the defendant's case, and the case of the plaintiff to meet it. Equity Rules, xx.

² This part is wholly unnecessary, and may be omitted. Equity Rules, xx.

³ This part may also be omitted, and the defendant's case may be stated and avoided by counter-statement, in the stating part of the bill. Equity Rules, xx.

⁴ This is also unnecessary, and may be omitted. Equity Rules, xx.

show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer; that is to say:

1. Whether, &c.
2. Whether, &c.

VIII. THE PRAYER FOR RELIEF.

For General Relief.

And that the said defendant may come to a fair and just account, &c., (*stating the special relief asked*) and that your orator may have such further and other relief in the premises, as the nature and circumstances of his case may require, and to your honours shall seem meet.

For an Injunction.

And that the said defendants, their counsellors, attorneys, or agents, may be restrained by an injunction issuing out of this honourable court, from proceeding further against your orator, in the said action commenced against him, in the district court for the city and county of Philadelphia, and now pending and at issue therein, for the recovery of the possession of the said premises, with the appurtenances; (*or as the case may be*) and also from instituting or proceeding in any new or other action at law for the recovery of the possession of the said premises, or any part thereof; and that your orator may have such further and other relief, &c.

For an Account.

And that the said defendants may set forth an account of all and every sum and sums of money received by them, or either of them, or by any person or persons by their or either of their order, or for their or either of their use, for or in respect of the said (*as the case stated in the bill may be;*) and when, and from whom, and from what in particular, all and every such sums were respectively received, and how the same respectively have been applied or disposed of; and that your orator may have such further, &c.

For a Specific Performance.

And that the said defendant may be decreed specifically to perform the said agreement entered into with your orator, as aforesaid, and to make a good and marketable title to the said premises; your orator

being ready and willing, and hereby offering specifically to perform the said agreement on his part, and upon the said defendant's making out a good and marketable title to the said premises and executing a proper conveyance thereof to your orator, pursuant to the terms of the said agreement, to pay to the said defendant the residue of the said purchase money or sum of ——— dollars; and that your orator may have such further, &c.

IX. THE PRAYER FOR PROCESS.

May it please your honours to grant unto your orator the commonwealth's writ of subpœna, to be directed to the said C. D. and E. F.,¹ thereby commanding them, and every of them, at a certain day, and under a certain pain, to be therein limited, personally to be and appear before your honourable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; [and further to stand to, perform, and abide such further order, direction, and decree therein, as to your honours shall seem meet.] And your orator shall ever pray, &c. (*Where the bill is for discovery only, the words within brackets must be omitted.*)

X. MEMORANDUM AT THE FOOT OF THE BILL.

The defendant A. B. is required to answer the interrogatories numbered respectively, 1, 2, 3, &c.

The defendant C. D. is required to answer the interrogatories numbered respectively, 5, 6, 7, &c.

ORIGINAL BILLS.

BILL FOR SPECIFIC PERFORMANCE.

A. B., of, &c., brings this his bill against C. D., of, &c., and thereupon your orator complains and says, that your orator being seised, or well entitled in fee simple, of or to a certain messuage or dwelling-house, with the appurtenances, situate at, &c., and hereinafter described, and being desirous of selling such premises, and the said defendant being

¹ The prayer for process must contain the names of all the defendants named in the introductory part of the bill; and if any of them are known to be infants, under age, or otherwise under guardianship, must state the fact. Equity Rules, xxii.

mind to purchase the same, your orator and the said defendant on, &c., entered into and signed a memorandum of agreement respecting the said sale and purchase in the words following, that is to say : (*stating the agreement verbatim*) as by the said memorandum of agreement, to which your orator craves leave to refer, when produced, will appear. And your orator further sheweth, that he hath always been ready and willing to perform his part of the said agreement, and upon being paid the said purchase money or sum of, &c., with interest, to convey the said premises to the said defendant and his heirs, and to let him into possession and receipt of the rents and profits thereof, from the time in the said agreement in that behalf mentioned ; and your orator well hoped that the said defendant would have performed the said agreement on his part, as in justice and equity he ought to have done. But now so it is, may it please your honours, that the said defendant alleges that he is, and always hath been, ready and willing to perform the said agreement on his part, in case your orator could have made, or can make him a good and marketable title to the said messuage and premises, but that your orator is not able to make a good title thereto ; whereas your orator charges that he can make a good title to the said messuage and premises. To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the several interrogatories hereinafter numbered and set forth, that is to say : 1. Whether, &c., (*interrogating as to the stating and charging parts.*) And that the said defendant may be compelled by the decree of this honourable court specifically to perform the said agreement with your orator, and to pay to your orator the said purchase money, with interest for the same from the time the said purchase money ought to have been paid, your orator being willing, and hereby offering specifically to perform the said agreement on his part, and on being paid the said purchase money and interest, to execute a proper conveyance of the said messuage and premises to the said defendant, and to let him into possession of the rents and profits thereof, from, &c. ; and that your orator may have such further or other relief in the premises as to your honours shall seem meet, and his case may require. May it please, &c.

BILL TO CANCEL A BILL OF EXCHANGE.

A. B., of, &c., brings this his bill against C. D. of, &c., E. F., of, &c., G. H., of, &c., and J. K., of, &c., and thereupon your orator complains and says ; that your orator, previously to the month of, &c., had fre-

quently accepted bills of exchange for the accommodation of Messrs. C. D. and E. F., defendants above named; that some time in or about the said month of, &c., they applied to your orator to assist them with a loan of his acceptance for a sum of money, and they severally assured your orator that if he would accept or indorse a certain bill of exchange for them, the said C. D. and E. F., they could procure the same to be discounted, and that they or one of them, would punctually provide your orator with the money to take up the same: and your orator, relying upon such promise, agreed to accept such bill of exchange, to be drawn upon him by the said C. D. and E. F. And your orator further sheweth, that the said C. D. and E. F. accordingly drew upon your orator a certain bill of exchange for the sum of \$5000, dated, &c., and payable three months after date, which your orator thereupon accepted. And your orator further sheweth unto your honours, that the said bill of exchange having been delivered by your orator to the said C. D. and E. F., without any consideration whatsoever had or received by your orator for the same, the said C. D. and E. F. ought either to have provided your orator with the money to take up the same, when due, as they had promised, or else have re-delivered the same to your orator to be cancelled; and your orator hoped that the said C. D. and E. F. would have provided your orator with the money to take up the bill of exchange, when the same became due, or else would have re-delivered the same, or caused the same to have been re-delivered to your orator to be cancelled, and that no proceedings would have been had against your orator to recover the amount thereof, as in justice and equity ought to have been the case. But now so it is, may it please your honours, that the said C. D. and E. F., combining and confederating to and with the said G. H. and J. K., and contriving how to wrong and injure your orator in the premises, they the said confederates absolutely refuse to deliver, or cause or procure to be delivered up to your orator, the said bill of exchange to be cancelled; and instead thereof, the said J. K. hath got into his possession the said bill, and hath lately commenced an action at law against your orator to recover the amount thereof; the said confederates, or some of them, at times giving out and pretending that the said bill of exchange was made and given by your orator to the said C. D. and E. F. for a full valuable consideration or considerations in money; whereas your orator expressly charges the contrary thereof to be the truth, and that your orator never had or received any good or valuable consideration or considerations for the said bill of exchange, and that the same was delivered by him to the said C. D. and E. F. for their accommodation, without receiving any consideration or considerations for the same, and upon the firm reliance that

they, or one of them, would supply your orator with the money to take up the said bill, when the same became due and payable: and so the said defendants will sometimes admit, but then the said defendant G. H. pretends that he discounted the said bill of exchange for full valuable consideration, in money or otherwise, at the time when the said bill was indorsed to him, and that when he paid or gave the full valuable consideration or considerations for the same, he had not notice that the said bill had been given by your orator, in the manner and upon the express stipulations hereinbefore mentioned, or without a full or any consideration received by your orator for the same, and that, therefore, your orator ought to pay the amount thereof; and the said G. H. further pretends that he indorsed the said bill of exchange to the said J. K. for good and valuable considerations, before he, the said G. H., received any notice from your orator, and before your orator had requested him to deliver up the same. Whereas your orator charges the contrary of all such pretences to be true; and particularly, that the said G. H. did not ever give, pay, or allow to the said C. D. and E. F., or either of them, the full value of any consideration whatever, for the said bill of exchange; and that the said G. H. had full notice, or had some reason to know, believe, or suspect that the said bill had been given by your orator to the said C. D. and E. F. in the manner, and upon the express stipulation hereinbefore mentioned, and without any valuable or other consideration having been received by your orator for the same. And your orator further charges, that the said G. H. received the said bill from the said C. D. and E. F., to get the same discounted for them, and with an express understanding on his part, to deliver over the money he obtained upon such bill, to them the said C. D. and E. F.; but that he never did procure such bill to be discounted, or, if he did, he applied the moneys he obtained upon the same to his own use, and never paid or delivered over any part thereof, to the said C. D. and E. F., or either of them. And your orator further charges, that the said G. H. had received notice from your orator, and the said C. D. and E. F., of the terms upon which the said bill had been obtained by the said C. D. and E. F., and had been required by your orator to deliver up the same to him, before he the said G. H. had indorsed the said bill of exchange to the said J. K.; and as evidence thereof, your orator expressly charges, that the said G. H. had the said bill of exchange in his custody, possession, or power, on, &c., last past; and that the said G. H. did, on, &c., last, offer the said bill of exchange for sale, together with other bills, to various persons. And your orator further charges, that the said G. H. did not receive any good or valuable consideration for indorsing the said bill of exchange to

the said J. K., but that the same was contrived between them, in order to compel your orator to pay the said bill when the same became due. And the said J. K. pretends, that he gave the value of the said bill of exchange for which he hath commenced his said action, in money or otherwise, to the said G. H., at the time of receiving the said bill; whereas, your orator expressly charges, that the said J. K. did not ever give or allow to the said G. A., or to any other person, any consideration for the said bill of exchange; but in case the said J. K. did give any consideration or considerations for the said bill of exchange, (which your orator does not admit) your orator charges that, at the time of the said bill of exchange being indorsed or delivered to the said J. K., and of his giving such consideration or considerations, (if any were or was paid by him) he knew, or had been informed, or had some reason to know, believe, or suspect, that your orator, and the said C. D. and E. F. had never received the full or any consideration for the said bill of exchange; and he well knew, or had been informed, that your orator had accepted the said bill of exchange for the accommodation of the said C. D. and E. F., without having received any consideration for the same; and that he also knew, or had been informed, or had reason to know, believe, or suspect, that the said G. H. had given no consideration for the said bill of exchange, and that the said G. H. had previously offered the said bill for sale (together with other bills) to several persons, who had refused to purchase the same. And your orator further charges, that the said J. K. is a trustee of the said bill of exchange for the said G. H., or for some other person or persons, whose names he refuses to discover, and that he holds the same for the said G. H., or for such other person or persons, without having given any consideration or considerations for the same, and that if he receives the amount of the said bill of exchange, or any part thereof, he is to deliver over or pay the same to the said G. H., or such other person or persons; and that he is indemnified by the said G. H., or such other person or persons, from all the costs attending the attempt to recover upon the said bill of exchange on which he has brought his said action at law. And notwithstanding the said J. K. got the said bill of exchange into his possession without giving any consideration for the same, yet he threatens and intends to proceed in his action at law, and in case he should recover judgment, to take out execution against your orator for the amount thereof. And your orator further charges, that the said several defendants, or some, or one of them, now have or hath, or lately had, in their or one of their custody, possession, or power, some book or books of account, letters, documents, or writings, from which the truth of the several matters and things afore-

said, or of some of them, would appear; and so it would appear if the said defendants would set forth a full, true, and particular account of all such books of account, letters, documents, and writings. To the end, therefore, &c., (*interrogating as to the stating and charging parts.*) And that the said defendant, J. K., may be decreed to deliver up, and the said C. D., E. F., and G. H., may be decreed to procure, the said bill of exchange to be delivered up to your orator to be cancelled, as having been given by your orator, and received by the said C. D. and E. F., and the said several defendants, without any consideration. And that the said defendants, respectively, may be restrained by the injunction of this honourable court, from proceeding in any action at law, already commenced against your orator, upon the said bill of exchange, and from commencing any other proceedings at law, against your orator, upon the said bill; and that they may also be restrained from negotiating, indorsing, or delivering over the said bill of exchange to any other person or persons; and that your orator may have such further and other relief in the premises, as to your honours shall seem meet, and the nature of his case may require. May it please, &c.

BILL TO CANCEL AN ASSIGNMENT IN FRAUD OF CREDITORS.

A. B., of, &c., trustee of the estate and effects of U. D., late of, &c., an insolvent debtor, brings this his bill, against E. F., of, &c., and thereupon your orator complains and says; that by an indenture bearing date on or about, &c., G. H., of, &c., demised unto the said C. D., a certain messuage or dwelling-house, with the appurtenances, then in the occupation of the said C. D., to hold from, &c., for the term of ten years, under and subject to the payment of the yearly rent of, &c., and to the performance of the several covenants, conditions, and agreements therein contained, as in and by the said indenture of lease, which is now in the possession, custody, or power of the said defendant, would, if produced by the said defendant, fully appear. That on or about, &c., the said C. D., being insolvent, and unable to pay his creditors, and well knowing that he could not avoid; and was about praying for the relief provided for insolvent debtors, concerted and agreed with the said defendant, to assign to him the said indenture of lease, for the nominal consideration of, &c., to be expressed in the deed of assignment; and the said C. D. accordingly, caused a deed of assignment to be prepared by his own conveyancer, and the same was dated on, &c., and was executed by the said C. D., on the day of the date thereof; and the said C. D., then, or about that time, delivered the said indenture of lease, and the assignment thereof, to the

said defendant. And your orator further sheweth, that the said defendant did not in fact pay to the said C. D., the said sum of, &c., and that the said assignment was so made in order to prevent the just creditors of the said C. D. from having the benefit of the said lease; and that the said defendant might hold the same in trust for the said C. D., or some part of his family, or for the joint benefit of the said C. D., and the said defendant. And your orator further sheweth, that on, &c., the said C. D. presented to the court of common pleas of the county of, &c., his petition praying for the relief provided for insolvent debtors, and having afterwards, by the order and direction of the said court, executed to your orator an assignment of all his estate, real and personal, in trust for the use and benefit of all his creditors, he the said C. D. was duly discharged as an insolvent debtor; and your orator hath since given security, to the satisfaction of the said court, for the faithful execution of his said trust, as by reference to the record of the said proceedings, to which your orator for greater certainty craves leave to refer, will fully appear. And your orator further sheweth, that he hath, by himself and his agents, repeatedly applied to the said defendant, and hath requested him to deliver up the said indenture of assignment to be cancelled, and also to deliver up to your orator the said indenture of lease, in order that your orator may dispose of the same for the benefit of the creditors of the said C. D.; with which just and reasonable requests your orator well hoped that the said defendant would have complied, as in justice and equity he ought to have done; but the said defendant absolutely refuses so to do, and now pretends that he duly paid to the said C. D. the said consideration of, &c., at the time of his executing the said indenture of assignment; whereas your orator charges the contrary thereof to be the truth. And your orator further charges, that the said defendant is a person in poor circumstances, and had not at that time a sum of, &c., in his possession or power: and the said defendant refuses to set forth, in what manner he paid the said sum of, &c., and when, and from whom, he received or obtained the same, or by what means he was enabled to make such payment. And at other times, the said defendant pretends that the said C. D. was indebted to him, at the time of executing the said assignment, in the said sum of, &c., and that the said assignment was executed by the said C. D. in consideration of the said debt; but when or how the said C. D. became so indebted to him, the said defendant refuses to discover; and your orator charges that, if the said C. D. had, at any time, been indebted to the said defendant, he had by some other means fully satisfied the said debt. And your orator further charges, that the said

C. D. first proposed to the said defendant, the making of the said assignment, and that the said defendant, at the time when the same was executed, knew or had been informed, or had some reason to know, believe, or suspect, that the said C. D. was in embarrassed circumstances, and was about to make application for relief as an insolvent debtor; and that the said defendant accepted such assignment with a view to the advantage of the said C. D., or of some part of his family. And your orator further charges, that it was agreed and understood that the said defendant was not to hold the said lease for his own sole benefit, and as his own property; and that the said lease was of much greater value than the said sum of, &c., and was in fact worth, &c.; and that the said C. D. caused and procured the said assignment to be recorded on the day it was executed. To the end, therefore, &c., (*interrogating as to the stating and charging parts.*) And that the said assignment of the, &c. may be declared to be void, as fraudulent against your orator and the rest of the creditors of the said C. D.; and that the said defendant may be decreed to deliver up the said assignment to be cancelled, and also to deliver up to your orator the said indenture of lease; and that your orator may have such further and other relief, &c. May it please, &c.

BILL FOR DOWER.

A. B., of, &c., brings this her bill against C. B., of, &c., and thereupon your oratrix complains and says, that H. B., the late husband of your oratrix, was in his lifetime, and during the time he was married to your oratrix, seised in fee simple, or fee tail, of divers freehold estates; and, being so seised, the said H. B. departed this life, on or about, &c., leaving your oratrix his widow, and the defendant, C. B., his son and heir at law, him surviving; whereby your oratrix became entitled by law to her dower in the said freehold estates; but upon, or soon after, the decease of the said H. B., the defendant, as his heir at law, or otherwise, entered and took possession thereof, and of all title deeds, evidences, and writings relative thereto; and your oratrix has frequently, by herself and otherwise, applied to the said defendant, and requested him to discover the said freehold estates, of which the said H. B. died seised, and his title thereto, and to account for and pay to your oratrix one-third part of the rents and profits of such freehold estates, which your oratrix is entitled to, in respect of her dower, since the death of the said H. B., and to assign and let your oratrix into the absolute possession and enjoyment of one-third part of such freehold, which your oratrix hoped he would have done. But now so it is, that the said defendant refuses to comply therewith, pretending that your oratrix was

never accoupled to the said H. B., in lawful matrimony; whereas your oratrix charges that on, &c., at, &c., the said H. B. was duly married to your oratrix, and that she is therefore entitled to her dower as aforesaid; but the said defendant refuses to discover the said freehold premises, which are subject thereto, or to produce the title deeds, evidences, and writings, or any of them, relative to the said freehold estates; wherefore your oratrix is unable to proceed at law to establish her said demand. To the end, therefore, &c., (*interrogating as to the stating and charging parts.*) And that the said defendant may discover and set forth, in manner aforesaid, a full and true description of such freehold estates as aforesaid, with all the circumstances and particulars thereof, or relative thereto; and that an account may be taken, by and under the decree and direction of this honourable court, of the rents and profits of the said freehold estates, wherein your oratrix is dowable, which have accrued since the death of the said H. B., and have, or might have been, received by the said defendant; and that one-third part thereof, arising from the said freehold estates, may be paid to her; and that one-third part of such freehold estates may be assigned and set out to her for her dower, and your oratrix let into the full and immediate possession and enjoyment thereof, and decreed to hold the same for her life; and that the said defendant may be decreed to produce all title deeds, evidences, and writings, relative to the said freehold estates, in order to effectuate the purposes aforesaid; and that your oratrix may have such further and other relief, &c. May it please, &c.

BILL FOR PARTITION.

A. B. of, &c., and C., his wife, L. G. of, &c., and D., his wife, and E. S., of, &c., widow, bring this their bill against R. F., of, &c., and M., his wife, and thereupon your orators and oratrixes complain and say, that W. R., of, &c., deceased, the father of your oratrixes, C. B., D. G., and E. S., and also of M. F., the wife of the said R. F., was in his lifetime, and at the time of his death, seised in fee simple, or of some other good estate of inheritance, to him and his heirs, of and in all that messuage or dwelling-house, &c., and also of and in all that other messuage, &c.; all which messuages, lands, and premises, are situate, lying, and being in, &c.; and being so seised, he the said W. R., did many years since depart this life intestate, leaving S. R., his wife, and your oratrixes and their said sister, M. F., his four daughters, and only children and co-heiresses, him surviving; and upon his death, the said messuages, lands, hereditaments, and premises, descended upon, and came to your

oratrixes and the said M. F., as such co-heiresses, subject only to the dower of their said mother, S. R. And your orators and oratrixes further show unto your honours, that the said S. R., the widow and relict of the said W. R., departed this life, some time in or about the month of, &c., whereupon your oratrixes and the said M. F. became, and have ever since been, and now are seised in fee, of and in the said messuages, lands, hereditaments, and premises, in four, equal, undivided parts or shares, as tenants in coparcenary. And your orators and oratrixes further show, that they have frequently applied to, and requested the said defendants to join and concur with your orators and oratrixes in making a fair, just, and equal partition of the said premises between them, in order that their respective shares and proportions thereof might be allotted, held, and enjoyed in severalty; and your orators and oratrixes well hoped that the said defendants would have complied with such reasonable requests, as in justice and equity they ought to have done; but the said defendants absolutely refuse to comply therewith, pretending that your orators and oratrixes and the said defendants have, ever since the death of the said W. R. and S. R., respectively, their said late father and mother deceased, constantly and regularly divided the yearly rents and profits of all the said messuages, lands, hereditaments, and premises, equally between them, and that it will not be for the benefit or advantage of either of them to make an actual partition thereof; whereas your orators and oratrixes charge, and so the truth is, that a fair, just, and equal partition of the said hereditaments and premises will tend greatly to the benefit and advantage of your orators and oratrixes, and the said defendants; but they, the said defendants, under divers frivolous pretences, absolutely refuse to join or concur with your orators and oratrixes therein. To the end, therefore, &c., (*interrogating as to the stating and charging parts.*) And that a commission of partition may be issued out of, and under the seal of this honourable court, and directed to certain commissioners therein named, to divide and allot the said messuages, lands, hereditaments, and premises, in equal fourth parts or shares; and that one full and equal fourth part or share may be allotted and conveyed to your oratrix C. B., her heirs and assigns; that one other full and equal fourth part or share may be allotted and conveyed unto your oratrix D. G., her heirs and assigns; and that one other full and equal fourth part or share may be allotted and conveyed unto your oratrix E. S., her heirs and assigns; and that your oratrixes may severally hold and enjoy their respective allotments of the said hereditaments and premises, in severalty; and that all proper and necessary conveyances and assurances may be executed for carrying such partition into effect; and that your

orators and oratrixes may have such further and other relief, &c. May it please, &c.

BILL OF INTERPLEADER.

The Philadelphia Saving Fund Society—a corporation duly established by the laws of the commonwealth of Pennsylvania—bring this their bill against A. B. and M. B., of, &c., and thereupon your orators complain and say; that your orators were incorporated by an act of assembly of this commonwealth, passed on the twenty-fifth day of February, one thousand eight hundred and nineteen, for the sole purpose of receiving and investing in public stock, or substantial security on real estate, such small sums as may be saved from the earnings of tradesmen, mechanics, labourers, servants, and others, and of affording to industrious persons the advantages of security and interest. That on, &c., the sum of, &c., was deposited with your orators by a female, who entered her name in their books as M. B., and received from them a book, commonly called a pass-book, numbered 53,051, in which the said sum of, &c., was entered to her credit. That on or about, &c., last, your orator received a notice from a person calling himself A. B., that the said M. B. is his wife, and that the money so deposited by her with your orators was the proper money of him the said A. B.; and he then and there claimed, and required the said sum of money to be paid to him. And your orators further show, that they caused notice to be given to the said M. B. of the claim and demand of the said A. B.; and the said M. B. appeared and denied the allegations of the said A. B., and claimed the said money as her own exclusive property. And your orators further show to your honours, that the said A. B. instituted a suit against your orators, before J. M., Esquire, one of the aldermen of the city of Philadelphia, to recover the said sum of, &c., so deposited with your orators; of which suit your orators gave notice to the said M. B., forthwith; and at the hearing before the said alderman, the said A. B. was present with G. N., Esquire, his attorney, and the said M. B. was also present, having, as her attorney, G. W., Esquire; and the said alderman gave judgment against your orators for the said sum of, &c., so deposited with them on, &c., last. And your orators further show that, having received from the said G. W., Esquire, a certificate setting forth that there was a good defence to the said claim, and particularly that the said A. B. was not the lawful husband of the said M. B., they entered an appeal from the judgment of the said alderman, and gave the requisite security, and have caused a transcript to be filed, according to law, in the court of common pleas of Philadelphia county, the cause being docketed as of June term 1854, No. 268. And

your orators further show, that they are, and have at all times been ready and willing to pay the said sum of money to whomsoever shall appear to be entitled thereto; but by reason that the said defendants persist in their adverse claims before mentioned, and the said A. B. has actually commenced proceedings at law against your orators for the recovery of the same, your orators are advised that they cannot with safety pay the said sum of money to either of the said defendants, but that they ought to interplead together touching their right to the same, in order that your orators may know to whom the said sum of money ought to be paid; and the said defendants ought to be restrained by the order and injunction of the court, from prosecuting, proceeding in, or commencing any action or actions at law against your orators, for and in respect of the matters aforesaid. To the end, therefore, &c., (*interrogating as to the statements in the bill.*) And that the said defendants may be decreed to interplead together; and that it may be ascertained, in such manner as the court shall direct, to which of them the said sum of money, so deposited with your orators, belongs and ought to be paid; and that your orators may be at liberty to pay the said sum of money, with the interest due thereon, into court, which they hereby offer to do, for the benefit of such of the said parties as shall appear to be entitled thereto; and that the said A. B. may be restrained, by the order and injunction of this honourable court, from further prosecution of the said action so commenced by him, against your orators as aforesaid; and that he and the said M. B. may, in like manner, be restrained from commencing or prosecuting any other proceedings at law whatsoever against your orators in respect of the matters in question in this suit, or any of them; and that your orators may have such further and other relief, &c. May it please, &c.

Affidavit.—G. G., treasurer of the Philadelphia Saving Fund Society, the plaintiffs above-named, maketh oath and saith, that, to the best of his knowledge and belief,¹ the said society do not, in any respect, collude with either of the above-named defendants, touching the matters in question in this cause, nor are they in any manner indemnified by the said defendants, or either of them, nor have they exhibited their said bill of interpleader, at the request of them, or either of them, but merely of their own free will, and to avoid being further proceeded against or molested touching the matters contained in their said bill. Sworn, &c.

¹ Where the bill is filed by an individual, the affidavit must be positive that "he does not collude," &c.

BILL FOR DISSOLUTION OF A PARTNERSHIP.

A. B., of, &c., brings this his bill against G. S., of, &c., and H. M., of, &c., and thereupon your orator complains and says, that in or about the month of, &c., your orator entered into an agreement with the said defendants to form a partnership with them, in the business of auctioneers, which agreement was reduced to writing, and signed by your orator and the said defendants, and was to the purport and effect following, that is to say: (*stating the same*), as in and by the said agreement, reference being thereunto had, when produced, will more fully and at large appear. And your orator further sheweth, that the said co-partnership business was entered upon, and hath ever since continued to be carried on by your orator and the said defendants, in pursuance of and under the aforesaid agreement, no articles or other instrument having ever been prepared and executed between them. And your orator further sheweth, that having much reason to be dissatisfied with the conduct of the said G. S., and being desirous, therefore, to dissolve the said partnership, your orator, on or about, &c., caused a notice in writing, signed by your orator, to be delivered to the said defendants respectively, to the purport and effect following, that is to say: "In conformity," &c.; as in and by such written notice, now in the custody or power of the said defendants, or of some one of them, when produced, will appear. And your orator further sheweth, that the said G. S. hath from time to time, since the commencement of the said partnership, applied to his own use, from the receipts and profits of the said business, very large sums of money, greatly exceeding the proportion thereof to which he was entitled; and in order to conceal the same, the said G. S., who hath always had the management of the said co-partnership books, hath never once balanced the said books. And your orator further sheweth, that having in the beginning of the year, &c., discovered that the said G. S. was greatly indebted to the said co-partnership, by reason of his application of the partnership moneys to his own use, your orator, in order to form some check upon the conduct of the said G. S., requested that he would pay all co-partnership moneys which he received into bank, to the credit of the said co-partnership, and would draw for such sums as he had occasion for; but the said G. S. hath wholly disregarded such request, and hath continued to apply the partnership moneys received by him, to his own use, without paying the same into bank; and hath also taken to his own use, moneys received by the clerks, and hath, by such means, greatly increased his debt to the partnership, without affording to your orator and the said H. M. any adequate means of ascertaining the true state of his accounts.

And your orator further sheweth, that he hath, by himself and his agents, from time to time, applied to the said G. S., and hath requested him to come to a full and fair account in respect of the said co-partnership transactions, with which just and reasonable request your orator well hoped that the said defendant would have complied, as in justice and equity he ought to have done. But now so it is, that the said G. S. absolutely refuses so to do, and at times pretends that he hath not received and applied to his own use more than his due proportion of the partnership profits; whereas, your orator charges the contrary thereof to be the truth; and so it would appear, if the said defendant would set forth a full and true account of all and every his receipts and payments, in respect of the said partnership transactions, and of the gains and profits which have been made in each year, since the commencement of the said partnership. And your orator charges that the said G. S. hath, in fact, received the sum of, &c., and upwards, beyond his due proportion of the partnership profits, and that he is nevertheless proceeding to collect in the partnership debts and moneys, whereby the balance due from him will be increased, to the great loss and injury of your orator and the said H. M. And your orator charges, that the said G. S. ought, therefore, to be restrained by the order and injunction of this honourable court, from collecting and receiving any of the said partnership debts and moneys; and your orator further charges, that the said H. M. refuses to join your orator in this suit. To the end,"therefore, &c., (*interrogating as to the stating and charging parts.*) And that the said co-partnership may be declared to be void; and that an account may be taken of all and every the said co-partnership dealings and transactions from the time of the commencement thereof; and also an account of all the moneys received and paid by your orator and the said defendants respectively in regard thereto; and that the said defendants may be decreed to pay to your orator what, if any thing, shall, upon the taking of the said accounts, appear to be due to him; your orator being ready and willing, and hereby offering to pay to the said defendants, or either of them, what, if any thing, shall, upon the taking of the said accounts, appear to be due to them, or either of them, from your orator; and that, in the mean time, the said G. S. may be restrained by the order and injunction of this honourable court, from collecting or receiving the partnership debts or other moneys; and that your orator may have such further or other relief, &c. May it please, &c.

BILL FOR AN ACCOUNT AND RECEIVER.

A. B., of, &c., brings this his bill against C. D., of, &c., and there-upon your orator complains and says ; that on or about, &c., your orator and the said defendant entered into co-partnership together as, &c. ; your orator engaging to bring into the business the sum of, &c., and being to receive one-third part or share of the profits ; and the said C. D. engaging to bring into the business the sum of, &c., and being to receive two-third parts or shares of the said profits. And your orator further showeth, that your orator, accordingly, brought into the business the said sum of, &c., and that the said co-partnership was carried on and continued until, &c., when the same was dissolved by mutual consent. And your orator further showeth, that the said co-partnership business was carried on in a house in, &c., which, at the time of the dissolution of the said co-partnership, was held by the said defendant and your orator, under an agreement for a lease for, &c. ; and it was verbally agreed between the said defendant and your orator, that the said defendant should take to himself the benefit of the said agreement, accounting to your orator for his proportion of the value thereof ; and in pursuance of such agreement, the said defendant hath ever since continued, and now is, in possession of the said house. And your orator further showeth, that no settlement of the said co-partnership accounts hath ever been made between your orator and the said defendant ; and that, since the said dissolution, your orator hath repeatedly applied to the said defendant to come to a final settlement with respect thereto ; and your orator well hoped that the said defendant would have complied with such, your orator's reasonable requests, as in justice and equity he ought to have done ; but the said defendant absolutely refuses so to do. And your orator charges, that the said defendant hath possessed himself of the said co-partnership books, and hath refused to permit your orator to inspect the same ; and hath also refused to render to your orator any account of the co-partnership moneys received by him. And your orator charges, that he has, since the said dissolution, paid the sum of, &c., in respect of the co-partnership debts. And your orator further charges, that upon a true and just settlement of said accounts, it would appear that a considerable balance is due from the said defendant, to your orator, in respect of their said co-partnership dealings ; but, nevertheless, the said defendant is proceeding to collect in the said co-partnership debts, and to apply the same to his own use, which the said defendant is enabled to do by means of his possession of the books of account as aforesaid. And your orator charges, that the said defendant ought to be restrained, by

the injunction of this honourable court, from collecting in the said debts; and that some proper person ought to be appointed, by this honourable court, for that purpose. To the end, therefore, &c., (*interrogating as to the stating and charging parts.*) And that an account may be taken of all and every the said late co-partnership dealings and transactions, until the time of the expiration thereof; and that the said defendant may be directed to pay to your orator what, if any thing, shall, upon such account, appear to be due from him; your orator being ready and willing, and hereby offering to pay to the said defendant what, if any thing, shall appear to be due to him from the said joint concern; and that some proper person may be appointed to receive and collect all moneys which may be coming to the credit of the said late co-partnership; and that the said defendant may, in the meantime, be restrained by the order and injunction of this honourable court, from collecting or receiving any of the debts due and owing thereto; and that your orator may have such further and other relief, &c. May it please, &c.

BILL TO WIND UP AN INSOLVENT LIMITED PARTNERSHIP.¹

A. B. of, &c., brings this his bill against C. D., E. F., and G. H. of, &c., trading under the firm of D. & F., on behalf of himself and all other unsatisfied creditors of the said firm of D. & F., who shall come in and contribute to the expense of this suit; and thereupon your orator complains and says, that the said firm of D. & F., is a special firm in, &c., under the statute relating to limited partnership; and was formed on or about, &c., for the term of five years; wherein the said defendants C. D., and E. F., are general partners, and the said defendant G. H. is the special partner; as will more fully appear, by reference to the certificate thereof on record in the office of the recorder of deeds, of the county of, &c., and to which, for greater certainty, your orator craves leave to refer. And your orator further sheweth, that the said firm of D. & F. are justly indebted to your orator in the full sum of, &c., on their promissory note dated, &c., and payable six months after date, to the order of your orator, which is now due and unpaid, as will appear by the said promissory note, now in your orator's possession, and ready, at all proper times, to be produced; and the said firm of D. & F. is also largely indebted to various other persons. And your orator further sheweth, that the said firm of D. & F. is insolvent, and has been notoriously insolvent in the mercantile market, for many weeks past; and that the general partners composing the said firm are

¹ See ante, § 890, note.

also insolvent. And your orator further sheweth, that, as he hath been informed and verily believes, the said general partners of the said limited firm of D. & F. have, or one of them has, since the said firm became insolvent, been making sales and improper dispositions of, or in some way or manner covering the property, estate, and effects of the said firm, or some part thereof; and that they control, and are able and likely to divert, the said property, estate, or effects, from the creditors equally; and are allowing favoured creditors to sue them, so as thereby to get an advantage and priority of payment. And your orator further sheweth, that, as he is informed and believes, the property, estate, and effects of the said limited partnership is large, consisting of ships, shares in ships, cargoes, stock in trade, debts, notes, bills, and other property and effects. And your orator further sheweth, that although the said firm of D. & F. has been insolvent, and stopped payment ever since, &c., and even before that time, yet they still attempt to carry on business; and that the same is done in fraud of creditors. And your orator further sheweth, that the said partners, constituting the said firm of D. & F., have neglected and refused to place, and fully deliver the partnership effects, in the hands of a proper and responsible trustee, to be distributed, without delay, among all the creditors of the said firm (and excluding the special partner) rateably, in proportion to the amount of their several debts, either due or to become due. And your orator insists, that the property of the said limited partnership has, ever since the first day the said firm became insolvent, become a trust for the benefit of all their creditors. To the end, therefore, &c., (*interrogating as to the statements in the bill.*) And that the property, estate, and effects of the said firm of D. & F. may be decreed to be a trust fund for the benefit of all their creditors, and that an account may be taken of all and every the debts due, or to become due, by the said firm of D. & F.; and also of the assets of the said firm; and that the said assets may be applied in payment of the debts of the said firm, rateably, in proportion to the amount thereof; and that the said defendants may be restrained by the order and injunction of this honourable court from selling or in any way disposing of the property, estate, and effects of the said firm, and from collecting or receiving any of the debts due and owing thereto; and that a receiver may be appointed to protect the trust fund and to distribute it among the several creditors who shall come in and prove their debts, under the decree to be obtained herein; and that your orator and the other creditors of the said firm may have such further and other relief, &c. May it please, &c.

BILLS TO RESTRAIN WASTE.

A. B., of, &c., brings this his bill against C. D., of, &c., and thereupon your orator complains and says, that your orator, before and at the time of making the indenture hereinafter mentioned, was seised of certain tenements, with the appurtenances, situate, &c., hereinafter more particularly described; and, being so seised, by an indenture bearing date, &c., and made between your orator of the one part, and the said C. D., the defendant, of the other part, your orator did demise and lease unto the said defendant, his executors, administrators, and assigns, all, &c., (*describing the subject of the demise;*) to hold the same, with the appurtenances, unto the said defendant, his executors, administrators, and assigns, from, &c., for the term of, &c., next ensuing, at the yearly rent of, &c. And your orator further sheweth, that the said defendant did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree with your orator, his heirs and assigns, that he, the said defendant, his executors, administrators, and assigns, would, during the said term, keep the said premises in good repair, and manage and cultivate the said farm and lands, in a proper, husband-like manner, according to the custom of the country, as by the said indenture, to which your orator craves leave to refer, when produced, will more fully appear. And your orator further sheweth, that the said defendant, under and by virtue of the said indenture, entered into the said demised premises, with the appurtenances, and became, and was possessed thereof, for the said term, so granted to him thereof by your orator as aforesaid. And your orator further sheweth, that at the time the said defendant entered upon the said premises, the same were in good repair and condition, and your orator hoped the said defendant would so have kept the same, and have cultivated the said lands in a proper and husband-like manner, according to the custom of the country, and that such parts of the premises as consisted of ancient meadow or pasture ground, would have remained so, and not have been ploughed up, and converted into tillage; and that no waste would have been committed on the said premises. But now so it is that, although the said premises and the buildings, out-houses, rails and fences, were in a good and perfect state and condition when the said defendant entered upon and took possession of the said premises, yet, they are now very ruinous and bad, and the land very much deteriorated, from the wilful mismanagement and improper cultivation thereof, by the said defendant, who has ploughed up certain fields called, &c., containing respectively, &c., and has otherwise committed great spoil, waste, and destruction in, upon, and about the said premises; and your orator charges,

that the said defendant ought to put the said premises into the same condition they were in, when he entered thereon, and to make your orator a reasonable compensation for the waste and damage done or occurred thereto; and that the said defendant ought to be restrained by the order and injunction of this honourable court from ploughing up the remaining pasture-fields, part of the said demised premises, which he threatens to do, and also restraining him from committing any further or other waste, spoil, or destruction, in and about, or to the said estate and premises, or any part thereof. To the end, therefore, &c., (*interrogating as to the material statements in the bill.*) And that the said defendant may be compelled by the decree of this honourable court to put the said premises into such repair and condition, in every respect, as far as circumstances will permit, as they were in, when he entered upon the same, under and by virtue of such demise as aforesaid; and may also be decreed to make a reasonable compensation to your orator for all waste done, committed, or suffered by him on the said premises, and all damage occasioned thereto by his mismanagement or neglect (your orator hereby waiving all pains and penalties incurred by the said defendant on account of committing waste on the said premises;) and that he may be decreed to keep the said premises in good and sufficient repair and condition, during the remainder of his interest therein, and to manage and cultivate the said farm and lands in a proper and husband-like manner, according to the custom of the country; and that he may be likewise restrained, by the order and injunction of this honourable court, from ploughing up the said remaining pasture lands, forming part of the said demised premises, and particularly the said fields called, &c., and from committing or permitting any further waste or spoil, in, on, or to the said demised premises, or any part thereof; and that your orator may have such further and other relief, &c. May it please, &c.

BILL FOR AN INJUNCTION.

J. A. B., (and others) of, &c., as well for themselves, as for such other citizens, residents and tax payers of the county of Philadelphia, who may come in and contribute to the expenses of this suit, bring this their bill against A. S., W. F., and W. S. A., county commissioners of the county of Philadelphia; and thereupon your orators complain and say, that they are residents, and owners of real and personal estate, within the county of Philadelphia, and as such are bound by law, and do pay all taxes justly assessed and levied thereupon, and as such citizens, residents, and owners, are directly interested in every question which can or may in any wise whatsoever increase or augment the amount of the said taxes

chargeable upon their property in the said county, and in the lawful and economical administration of the affairs thereof. And your orators further show, that the said defendants were, according to law, elected county commissioners of the county of Philadelphia, have been duly qualified, have undertaken the discharge of the duties thereof, and now fill the said office. And your orators further show, that by an act of the general assembly of the commonwealth of Pennsylvania, approved the third day of April 1837, to which your orators crave leave to refer, and by certain proceedings by virtue thereof, there was and is established by law, in this commonwealth, a body politic or corporate known by the name of "The Sunbury and Erie Railroad Company," with all the powers and privileges which, by the said law, and by any acts and supplements thereto duly approved, are granted and conferred. And your orators further show, that they are informed and believe, and so charge, that these defendants, as such county commissioners, are about, for or on behalf of the county of Philadelphia, and in the name of the said county, to contract for, purchase, or subscribe to, stock of the said corporation, to the extent of twenty thousand shares, at the rate of one hundred dollars for each share, and to make payment therefor, by the issue of bonds of the said county, bearing an interest at the rate of six per cent. per annum, to the amount of two millions of dollars. And your orators further show, that they do not know certainly, nor are they able to ascertain, whether the said contract has been actually entered into by the said defendants; but, if the said contract and subscription has been entered into and made, they believe and charge that, for the purpose of paying for the said stock so contracted for, subscribed to, and purchased, the said defendants have not yet, but are about to, make and issue, in the name of the county of Philadelphia, and with the pledge of the faith and credit of the said county for the payment thereof, bonds to the amount required by the said contract, subscription, or purchase, namely, to the amount of one hundred dollars for each of said twenty thousand shares of stock, in all, two millions of dollars. And your orators further show, that by the said contract, subscription, and purchase, and by the issuing of the said bonds, the debt of the said county, now exceeding one million eight hundred thousand dollars, will be greatly increased, the credit thereof seriously impaired, and the taxes chargeable to, and to be levied in the said county, upon the property of your orators, and their fellow citizens, will be greatly augmented. And your orators further show, that they are advised and believe, that the said contract, and subscription and purchase, and the making and issuing of the bonds of the said county, by the defendants as

aforesaid, for the purpose of carrying into effect the said contract and subscription, and paying for the said stock, are without any warrant or authority whatsoever. To the end, therefore, &c., (*interrogating as to the statements in the bill.*) And that the said defendants may be restrained, by the order and injunction of this honourable court from subscribing, taking, or purchasing, or from agreeing to subscribe, take, or purchase, for, or on behalf of, or in the name of the county of Philadelphia, any shares of the stock of the Sunbury and Erie Railroad Company aforesaid, and from pledging the credit of the said county, in any manner, thereto, and from making, signing, sealing, delivering, or issuing any bond, or instrument of writing of any nature whatsoever, for or on behalf of the said county, for the purpose of purchasing, paying for, or in any manner connected with any agreement to take, purchase, or pay for, any shares of the stock of the Sunbury and Erie Railroad Company aforesaid. And that it may be decreed and declared by this honourable court, that any such contract, agreement, or subscription by the said defendants, in the name of the said county, to or for any stock of the Sunbury and Erie Railroad Company is null and void, and that the same, if executed, be cancelled;¹ and that any bonds of the county of Philadelphia signed and sealed by the said county commissioners, issued in pursuance of any such contract, subscription, or agreement, or for the payment of any shares of the stock of the Sunbury and Erie Railroad Company aforesaid, are or will be null and void, and not binding and obligatory upon the said county, or the citizens thereof; and that the county commissioners of the county of Philadelphia have not, by law, the right or power to purchase, contract for, or subscribe to the stock of the Sunbury and Erie Railroad Company aforesaid, in the name and on behalf of the said county; and that your orators may have such further and other relief, &c. May it please, &c.

BILLS TO PERPETUATE TESTIMONY.

1. *Of Illegitimacy.*

M. A. H., of, &c., brings this her bill against W. W., G. W., S. W., and C. W., of, &c., and thereupon your oratrix complains and says, that on, &c., your oratrix intermarried with one J. H., now deceased, who, in his lifetime, and at the time of her decease, was seised of, or well en-

¹ It would seem, that no such relief as that prayed in this bill, could be had, without making the railroad company parties defendant, who were clearly interested in resisting such a decree.

titled in fee, to considerable real estate in, &c. That the said J. H. died on, &c., intestate, and without issue, or known heirs, competent to inherit his said real estate, but leaving your oratrix him surviving, in whom his said real estate vested for such estate, as the said J. H., in his lifetime, had therein, by virtue of the intestate laws of Pennsylvania; and your oratrix, ever since his decease, hath been, and now is, in the lawful possession of the said real estate, and in the receipt of the rents and profits of the same. And your oratrix further sheweth, that the said J. H. was born about the year, &c., and that he was the illegitimate son of one S. K., of, &c., who, at the time of the birth of her said son, the said J. H., was a single and unmarried woman. That some time after the birth of the said J. H., his mother, the said S. K., intermarried with one W. A. W., and is since deceased, leaving issue four children, to wit, the said defendants; and your oratrix well hoped that her title as statutory heir of her late husband, the said J. H., deceased, to the said real estate so vested in her, would in no manner have been disputed; yet so it is, that the said defendants now insist that the said J. H. was the legitimate child of their mother, the said S. K., born in lawful wedlock, and that they, the said defendants, are the lawful heirs of the said J. H., deceased, and entitled to the said real estate, and that your oratrix is only entitled to dower therein; whereas your oratrix expressly charges the contrary thereof to be the truth, and that the said S. K., at the time of the birth of the said J. H., was single and unmarried. But nevertheless the said defendants, although they well know the several facts aforesaid, yet mean and intend to dispute the validity of your oratrix's title to the said real estate, when the several witnesses necessary to establish the same are dead, many of whom are now infirm and much advanced in years. To the end, therefore, that the said defendants may, if they can, show why your oratrix should not have the testimony of the said witnesses perpetuated,¹ and that your oratrix may be at liberty to examine her witnesses to the several matters and things herein before mentioned, and particularly with reference to the illegitimacy of her late husband, the said J. H., deceased, so that the testimony of the said witnesses may be preserved and perpetuated; and that your oratrix may be at liberty, at all future occasions, to read and make use of the same, as she shall be advised. May it please, &c.²

¹ As no discovery is sought from the defendant, interrogatories are unnecessary in a bill to perpetuate testimony.

² This bill should not pray relief.

2. Of Re-entry for Breach of Covenant.

A. B., of, &c., brings this his bill against C. D., of, &c., and, thereupon, your orator complains and says, that on, &c., your orator made his certain deed, bearing date the day and year aforesaid; by which said deed he conveyed to the said defendant, his heirs and assigns, all that, &c., (*describing the premises*), to have and to hold to the said defendant, his heirs and assigns forever, by yielding and paying, therefor, unto your orator, his heirs and assigns, the yearly rent or sum of, &c., commencing on, &c., next after the date of the said deed, and payable in half yearly payments, on, &c., in every year forever, without any deduction, defalcation, or abatement for any taxes, charges, or assessments whatsoever, to be assessed as well on the said thereby granted lot, as on the said yearly rent. And by the said deed it was further made lawful, on default of payment of said yearly rent, on the days or times, and in manner aforesaid, for your orator, his heirs and assigns, to enter into and upon the said thereby granted premises, or any part thereof, and into the buildings thereon to be erected, and distrain for the said yearly rent so in arrear and unpaid, and to proceed and sell such distrained goods and effects, according to the usual course of distresses for rent charges. But if sufficient distress could not be found upon the said thereby granted premises, to satisfy the said yearly rent in arrear, and the charges of levying the same; then, by the said deed, it was made lawful for your orator, his heirs and assigns, into and upon the said thereby granted lot, and all improvements thereon, wholly to re-enter, and the same to have again, repossess, and enjoy, as in his first and former estate and title in the same, and as though the said deed had never been made. And the said defendant, for himself, his heirs, executors, administrators, and assigns, did covenant, promise and agree, by the said deed, that he, the said defendant, his heirs and assigns, should and would pay or cause to be paid, the said yearly rent above mentioned, at the days and times, and under the conditions heretofore set forth, as in and by the counterpart of the said deed, now in your orator's possession, and ready to be produced, as this honourable court shall direct, will on reference more fully appear. And your orator further sheweth, that on, &c., by the terms and conditions of the said deed, heretofore set forth, there became due to him, by the said defendant, the sum of, &c., the same being the half-yearly rent, by the said deed so as aforesaid reserved, and payable on that day. That your orator, by his lawful attorney, duly constituted and appointed, did, upon that day, and at and upon the said land, make demand of the said sum of, &c., so due and payable as aforesaid, and did

then and there continue said demand until the last moment of the said day, to wit, until the hour of, &c.; but that, notwithstanding said demand, so continued as aforesaid, the said defendant did not, nor did any one for him, pay to your orator the said sum of, &c., so reserved as aforesaid, or any part or portion thereof. And your orator further sheweth, that there was not upon said land, sufficient distress to pay the said sum of, &c., and the costs of levying the same, according to the tenor and intent of the said deed. And your orator further sheweth, that for default of payment of the said sum, of, &c., so as aforesaid reserved, and for want of sufficient distress to pay the same; and the costs of levying said distress, on the said, &c., and at the hour aforesaid, and by his lawful attorney so constituted as aforesaid, your orator did re-enter upon the said lot or piece of ground, agreeably to the tenor and intent of the said deed, and of the said condition therein contained as aforesaid; and your orator hath ever since been, and is now, in the lawful possession thereof; and your orator well hoped that he and his heirs and assigns would have been permitted to enjoy the same quietly without any interruption from any person whomsoever. Nevertheless the said defendant insists and pretends that your orator did not legally demand the said rent when the same became due as aforesaid, and did not in default of payment re-enter upon the said land in accordance with the condition in the said deed, whereas your orator charges the contrary thereof to be the truth; and the said defendant threatens that he will hereafter contest the rights of your orator to the said land, when the witnesses who are able to prove the matters hereinbefore set forth are dead; whereby your orator, his heirs and assigns, will be deprived of the benefit of their testimony, and your orator's right may be thereby defeated. To the end, therefore, that the said defendant may, if he can, show why your orator should not have the testimony of the said witnesses perpetuated. And that your orator may be at liberty to examine his witnesses with respect to the several matters aforesaid, and particularly with respect to his demand of the said rent, and his re-entry upon the said land, so that their testimony may be perpetuated and preserved. May it please, &c. (*This bill should not pray relief.*)

BILLS OF DISCOVERY.

1. *In aid of a Defence at Law.*

S. R. S., of, &c., brings this his bill against P. P. G., of, &c., and thereupon your orator complains and says; that heretofore, to wit, at the term of, &c., the said defendant did commence and prosecute against your orator, a certain suit at law, in this honourable court, wherein the said

defendant, by his attorney, hath filed a declaration, to which your orator, by his attorney, hath pleaded an issuable plea, so that the said cause is at issue. And your orator further sheweth, that the said defendant, in his said action at law, claims to recover against your orator the sum of, &c., or some other large sum of money, for certain goods and merchandise sold and delivered by the said defendant to one A. T. G., for the payment whereof he alleges and pretends that your orator undertook and promised to be responsible to him the said defendant. And your orator further sheweth, that on or about, &c., the said A. T. G., being desirous of purchasing a bill of goods from the said defendant upon credit, requested your orator to guaranty and become responsible to the said defendant, for the payment of the same, which your orator agreed to do; and, thereupon your orator drew an order upon the said defendant, in favour of the said A. T. G., and delivered the same to the said A. T. G., in the words and figures, or to the purport and effect following, that is to say, (*stating the same.*) And your orator further sheweth, that the said defendant received the said order from the said A. T. G., and sold and delivered to him a bill of goods, upon the faith and credit thereof; and that the said A. T. G. gave to the said defendant his promissory note in payment for the said bill of goods, which promissory note was duly paid, at maturity, by the said A. T. G. And your orator further sheweth, that the said defendant subsequently, from time to time, sold and delivered to the said A. T. G. other goods and merchandise, without the knowledge of your orator, in payment whereof, he received the promissory notes of the said A. T. G., many of which were paid by him, at the maturity thereof; which course of dealing between the said defendant and the said A. T. G., continued until about, &c.; about which time the said A. T. G. became insolvent, and failed to pay his notes as they became due. And the said defendant now alleges and pretends, that your orator agreed to become responsible for the payment of such subsequent purchases of merchandise, by the said A. T. G., from the said defendant; whereas your orator expressly charges the contrary thereof to be the truth. And your orator also charges, that the said defendant now hath, or lately had, in his custody, possession, or power, some book or books of account, letters, documents, accounts, or writings, from which the truth of the several matters and things aforesaid, or of some of them, would appear. And so it would appear, if the said defendant would set forth a full, true, and particular account of all such books of account, letters, documents, accounts, and writings. To the end, therefore, that the said defendant may upon his corporal oath, &c., (*interrogating as to the stating and charging parts.*) And that the said defendant may make a full and

true disclosure and discovery of the several matters aforesaid, to the end that your orator may be the better enabled to defend the said action; and that he may be restrained by the order and injunction of this honourable court, from further proceeding in the said action against your orator. May it please, &c. (*This bill should not pray relief.*)

2. *In aid of an Execution.*

A. B., of, &c., brings this his bill against C. D. and E. F., of, &c., and thereupon your orator complains and says, that your orator is a creditor of the said defendant, C. D., and hath recovered a judgment against him in an action in the district court for the city and county of Philadelphia of the term of, &c., for the sum of, &c., with costs of suit, which said judgment was recovered on, &c.; and a writ of fieri facias was issued thereon to the term of, &c., which has been duly returned by the sheriff "nulla bona." That your orator is informed and believes, and so charges, that the said C. D., the defendant in the said judgment, hath real and personal estate, wherewith the said judgment may be satisfied; that such real estate hath been fraudulently conveyed and transferred, and such personal estate hath been removed and cancelled, by the said C. D. with intent to prevent the same being made liable for the payment of his debts; whereby your orator is prevented from having execution of his said judgment. And your orator further sheweth, that he is informed and believes, and so charges, that the said defendant, E. F., hath possession or knowledge of the real or personal estate of the said C. D., and can make discovery of such facts, as will enable your orator to have satisfaction of his said judgment. To the end, therefore, that the said defendants may upon their several and respective corporal oaths, &c., (*interrogating minutely as to the statements in the bill.*) And that the said defendants may make a full and true disclosure and discovery, as to the several matters aforesaid, to the end that your orator may be enabled to have execution of his judgment; may it please your honours to grant unto your orator a writ of scire facias, to the sheriff of the county of Philadelphia directed, requiring him to make known to the said C. D., and E. F., that they be and appear before this honourable court, at a certain time to be therein appointed, to answer this bill, and all such interrogatories as shall be propounded to them, or show cause why they should not, and abide the judgment of this honourable court in the premises. And your orator will ever pray, &c.

Affidavit.—A. B., the complainant above-named, being duly sworn, saith, that he verily believes the facts set forth in the foregoing bill to be true. Sworn, &c.

BILLS NOT ORIGINAL.

SUPPLEMENTAL BILL.

A. B., of, &c., brings this his supplemental bill against C. D., of, &c., and thereupon your orator complains and says; that on, &c., your orator exhibited his original bill of complaint against the said defendant, thereby praying that the said defendant might be decreed specifically to perform his agreement with your orator, touching the lease of the farm and premises in the said bill mentioned, and to grant to your orator a lease therefor, for, &c., commencing from the expiration of his former lease, at the yearly rent of, &c.; your orator being willing and ready to do and perform every thing on his part, required to be done and performed, in pursuance of the said agreement. And your orator further sheweth, that the said defendant appeared, and put in his answer to the said original bill; as by the said bill and answer, now remaining of record in this honourable court, reference being thereunto had, will appear. And your orator sheweth, by way of supplement, that since the filing of the said original bill, the said defendant hath caused an action of ejectment to be commenced in the court of, &c., for the purpose of turning your orator out of possession of the said farm and premises; and the said action is still depending in the said court. And your orator, being advised that the said defendant cannot support such action, and that your orator is entitled to a specific performance of the said agreement, as prayed by his said original bill, he has, by himself and his agents, several times applied to, and requested the said defendant to desist from proceeding in the said action; and he was in hopes that the said defendant would have complied therewith, as in justice and equity he ought to have done. But so it is, that the said defendant absolutely refuses to comply with your orator's requests, and insists upon proceeding in his said action, and to turn your orator out of possession of the said farm and lands, to the manifest wrong and injury of your orator, in the premises. To the end, therefore, &c., (*interrogating as to the statements.*) And that the said defendant may be restrained, by the order and injunction of this honourable court, from proceeding in the said action of ejectment, and from commencing any other action or proceeding at law, for the purpose of turning your orator out of possession of the said farm and lands; and that your orator may have such further and other relief, &c. May it please, &c.

SUPPLEMENTAL BILL AFTER DECREE.

G. S., of, &c., brings this his bill against G. W., of, &c., and thereupon your orator complains and says, that on, &c., your orator exhibited his original bill of complaint against E. W., of, &c., thereby stating such matters and things as are therein, for that purpose, more particularly mentioned and set forth, and praying that the said E. W. might be compelled, by the decree of this honourable court, specifically to perform his agreement with your orator in the said bill mentioned, and transfer and assign unto your orator, &c., (*as in the prayer of the original bill.*) And your orator further sheweth, that the said E. W., having been duly served with process, appeared and put in his answer to the said bill, and your orator replied thereto; and the said cause being at issue, and witnesses having been examined on both sides, the same was, according to the practice of the court, set down for hearing; and at, &c., the said cause came on to be heard, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed, by this honourable court, that, &c., (*stating the decree for specific performance, &c.;*) as in and by the said bill, answer, and proceedings, now remaining of record in this honourable court, reference being thereunto had, will fully appear. And your orator further sheweth, by way of supplement, that on or about, &c., after the exhibiting by your orator of his said original bill of complaint, and after the said E. W. had put in his answer thereto, and whilst your orator was in the possession and enjoyment of the said premises, he, the said E. W., without any valuable consideration whatever, assigned and transferred his title to the said premises to the said G. W., the defendant, who is the brother of the said E. W.; and your orator further sheweth, that at the time of the said assignment, the said defendant well knew, or was informed, that the said original bill of complaint exhibited by your orator against the said E. W., was pending and undetermined, and that the said E. W. was not in the possession of the said premises, and that your orator claimed title to the same; and your orator further sheweth, that the said defendant did not pay any valuable consideration for the said assignment. And your orator further sheweth, that the said defendant having thus obtained the legal title to the said premises threatens and intends to enter upon and take possession of the said premises, or to commence proceedings at law to turn your orator out of possession of the same, to the manifest wrong and injury of your orator. And your orator is advised, that he is entitled to the same relief against the said defendant, as he was

entitled to against the said E. W., and that the said decree, so made against the said E. W., ought to be prosecuted and carried into full effect against the said defendant. To the end, therefore, &c., (*interrogating as to the statements in the bill.*)¹ And that your orator may have the benefit of the said decree, and that the same may be directed to be prosecuted and carried into full effect against the said defendant; and that the said defendant may be compelled, by the decree of this honourable court, to assign and transfer unto your orator, &c., (*as in the prayer of the original bill;*) and that the said defendant may be restrained by the order and injunction of this honourable court from transferring or assigning the legal title to the said premises to any other person or persons whatsoever, and from molesting or disturbing your orator in the possession and enjoyment thereof, or from commencing or prosecuting any action or proceeding at law, for the purpose of turning your orator out of the possession of the same; and that your orator may have such further and other relief, &c. May it please, &c.

BILL OF REVIVOR.

A. B., of, &c., brings this his bill against C. D., of, &c., and thereupon your orator complains and says; that J. A., late of, &c., but now deceased, on or about, &c., exhibited his original bill of complaint in this honourable court, against the said defendant, thereby stating such several matters and things as are therein contained, and praying as therein particularly set forth; and your orator further sheweth, that process duly issued against the said defendant, and he appeared and put in his answer to the said bill; and that some proceedings have been had before the master to whom this cause stands referred, but no general report hath yet been made in the said cause. And your orator further sheweth, that the said J. A., lately, on or about, &c., departed this life intestate; and that your orator hath obtained letters of administration of the goods and chattels, rights and credits of the said J. A., deceased, to be granted to him, by the register of wills of the proper county, and hath thereby become, and now is, his legal personal representative. And your orator further sheweth, that the said suit and proceedings have become abated by the death of the said J. A.; and your orator is, as he is advised, as the personal representative of the said J. A., entitled to have the said suit and proceedings revived against the said defendant, and to have the said cause

¹ If a discovery be required from the original defendant, he should be made a party to the supplemental bill, for that purpose.

put in the same state and condition as the same was in, previously to the death of the said J. A. To the end, therefore, that the said defendant may answer the premises;¹ and that the said suit and proceedings, which so became abated as aforesaid, may stand revived, and stand in the same plight and condition as they were in, at the time of the death of the said J. A., or that the said defendant may show good cause to the contrary. May it please your honours to grant unto your orator the commonwealth's writ of subpoena to be directed to the said C. D., thereby commanding him at a certain time, and under a certain pain, to be therein limited, personally to be and appear before your honourable court, and then and there [to answer the premises and]² to show cause, if he can, why the said suit and proceedings should not stand and be revived against him, and be in the same plight and condition as the same were, at the time of the abatement thereof; and further to stand to, perform and abide such order and decree in the premises as to your honours shall seem meet. And your orator shall ever pray, &c.

ORIGINAL BILL IN NATURE OF A BILL OF REVIVOR.

A. B., of, &c., brings this his bill against C. H., and E. H., of, &c., and thereupon your orator complains and says; that on, &c., he exhibited his original bill of complaint in this honourable court, against G. H., of, &c., now deceased, setting forth in substance that, &c., (*setting forth briefly the statements of the bill, sufficient to show the nature of the case and rights involved;*) and praying, &c., (*as in the prayer of the original bill.*) And your orator further sheweth, that, &c., (*stating the proceedings had in the cause, and its then situation.*) And your orator further sheweth, that before any further proceedings were had in the cause, and on or about, &c., the said G. H. departed this life, leaving the said C. H., his only child and heir at law, him surviving. And your orator further sheweth, that the said G. H., in his lifetime, made and published his last will and testament, dated, &c., and therein and thereby devised all his estate, real and personal, to the said E. H., who thereby claims to be entitled to, and have interest in the premises in question in this cause; as in and by the said last will and testament, since the decease of the said G. H., duly proved and remaining of record, in the register's office at, &c., will, on reference, more fully appear. And your orator is

¹ No interrogatories are necessary.

² Where it is only necessary to pray a subpoena to revive, the words within brackets should be omitted.

advised, that the said suit having become abated by the death of the said G. H., he is entitled to have the same revived against the said C. H., the heir at law of the said G. H., and is also entitled to have the said suit and the proceedings therein stand in the same plight and condition, and to have the benefit of such proceedings against the said E. H., the devisee in such will, in the same manner, and to the same effect, as he was entitled to, against the said G. H., in his lifetime. But now so it is, that the said C. H., in order to defeat the just claims of your orator, insists and pretends that the said G. H., at the time when he is alleged to have executed the said will, was wholly incompetent to execute the same, or any other last will and testament; whereas, your orator charges the contrary thereof to be the truth. To the end, therefore, that the said defendants may answer the premises, and that the said suit and proceedings may stand revived against the said C. H., and be in the same plight and condition as they were in at the death of the said G. H.; and that your orator may have the same benefit and advantage of such suit and proceedings against the said E. H., as he could or might have had against the said G. H., if he were living, or that they may show cause to the contrary. May it please, &c., (*as in the preceding form*) to answer the premises; and the said C. H., to show cause, if any he hath, why the said suit and the proceedings therein, should not stand and be revived against him, and be in the same plight and condition as they were at the death of the said G. H.; and the said E. H., to show cause, if any he hath, why your orator should not have the same benefit of this suit and of all the proceedings therein against him, the said E. H., as your orator had, or could have against the said G. H., if living; and further, that the said defendants may stand to, perform, and abide such further order, direction, and decree in the premises, as to your honours shall seem meet. And your orator shall ever pray, &c.

BILLS OF REVIEW.

1. *For Errors in law apparent on the face of the Decree.*

A. B., of, &c., brings this his bill against C. D., of, &c., and thereupon your orator complains and says; that on, &c., the said defendant exhibited his bill of complaint in this honourable court, against your orator, and thereby set forth, that, &c., (*here insert the substance of the original bill;*) and your orator being served with a process for that purpose, appeared, and put in his answer to the said bill, to the effect following: (*here insert the substance of the answer;*) and said defendant replied to the said answer, and issue having been joined, and witnesses examined,

the said cause was, according to the practice of the court, set down for hearing, and was heard before your honours on, &c., when it was ordered, adjudged, and decreed by this honourable court, that, &c., (*here insert the decree;*) and your orator insists that the said decree is erroneous, and ought to be reviewed, reversed, and set aside, for many apparent errors and imperfections, inasmuch as, &c., (*here insert the errors complained of.*) In consideration whereof, and inasmuch as such errors and imperfections appear in the body of the said decree, your orator hopes that the said decree will be reversed and set aside, and no further proceedings had thereon. To the end, therefore, &c., (*interrogating as to any fact comprised in the statement that may be necessary.*) And that, for the reasons, and under the circumstances aforesaid, the said decree may be reviewed, reversed, and set aside, and no further proceedings had thereon. May it please, &c.

2. *For Errors in fact.*

Whereby your honours decreed, that your orator's title to the said premises was valid and effectual; after which the said C. D. petitioned your honours for a rehearing, and the said cause was accordingly reheard, and a decree of reversal made by your honours, on the ground of the said C. D., being the heir at law of the said G. H., deceased; as in and by the said decree and other proceedings now remaining of record, in this honourable court, reference being thereunto had, will fully appear. And your orator sheweth unto your honours, by leave of this honourable court, first had and obtained for that purpose, by way of supplement, that since the said decree of reversal, your orator has discovered, as the fact is, that the said G. H. was, in his lifetime, seised in his demesne as of fee, of and in the hereditaments and premises in question in the said cause; and that the said G. H. being so seised, and of sound mind, duly made and published his last will and testament in writing, bearing date on or about, &c., and thereby gave and devised unto the said J. W., his heirs and assigns forever, to and for his and their own absolute use and benefit, the said hereditaments and premises in question, in the cause; which your orator claims to be entitled to as purchaser thereof, from the said J. W. And your orator further sheweth, that since the said decree of reversal was so made as aforesaid, to wit, on or about, &c., the said C. D. departed this life intestate, leaving the said E. F. the defendant, his heir at law, who, as such, claims to be entitled to the said hereditaments and premises, in exclusion of your orator. And your orator is advised and insists, under the circumstances aforesaid, that the said last mentioned decree, in consequence of the discovery of such new matter as aforesaid,

ought to be reviewed and reversed; and that the first decree, declaring your orator entitled to the said hereditaments and premises, should stand, and be established and confirmed; and for effectuating the same, the said several proceedings, which became abated, by the death of the said C. D., should stand, and be revived against the said defendant as his heir at law. To the end, therefore, &c., (*interrogating as to the preceding statements, and particularly as to the will, &c.*) And that the said suit may be revived against the said defendant, or that he may show cause to the contrary; and that the said last decree, and all proceedings thereon, may be reviewed and reversed, and the said first mentioned decree may stand, and be established and confirmed, and added to, by the said will being declared a good and effectual devise of such hereditaments and premises as aforesaid; and that the said defendant may be decreed to put your orator into possession of the said hereditaments and premises, and in the same situation in every respect, as far as circumstances will now permit, as your orator would have been in case such last decree had never been pronounced and executed; and that your orator may have such further and other relief, &c. May it please, &c.

3. *After affirmance on appeal.*¹

A. B., of, &c., brings this his bill against I. W. of, &c., and thereupon your orator complains and says; that on, &c., the said defendant exhibited his original bill of complaint against your orator, in the court of common pleas of the county of, &c., and thereby set forth, that, &c., (*here insert the substance of the original bill;*) and your orator being served with process, for that purpose, appeared, and put in his answer to the said bill, to the effect following: (*here insert the substance of the answer;*) and the said defendant replied to the said answer, and issue having been joined, and witnesses examined, the said cause was, according to the practice of the said court, set down for hearing; and was heard before the said court on, &c., when it was ordered, adjudged, and decreed by the said court, that, &c., (*here insert the decree.*) And your orator further sheweth, that conceiving the said decree to be erroneous, and that he was thereby aggrieved and injured, your orator entered an appeal from the said decree to this honourable court; and the said appeal having been duly perfected, and the record of the said cause removed to this honourable court, the said cause was set down for hearing before your honours, upon the said appeal, and was heard by this honourable

¹ See ante, § 861-3.

court on, &c., when it was ordered, adjudged, and decreed, that the decree of the said court of common pleas should be, and the same was in all things affirmed, confirmed, and established, &c. And the record thereof, with the said decree of this honourable court, was afterwards, on, &c., remitted to the said court of common pleas, in order that the said decree so made by this honourable court might be carried into full effect; as in and by the said bill, answer, decrees, and proceedings, now remaining of record in the said court of common pleas, will fully appear. And your orator sheweth unto your honours, by leave of this honourable court first had and obtained for that purpose, by way of supplement, that since the said decree of affirmance, and since the said record was remitted to the said court of common pleas, &c., (*here set forth the new facts which have arisen, or the facts which have been newly discovered, upon which the decree is sought to be reviewed.*) And your orator is advised and insists, that under the circumstances aforesaid, the said decree of affirmance ought to be reviewed, and for the cause aforesaid, as well the said decree of affirmance, as also the original decree of the said court of common pleas, ought to be reversed and set aside; and that, inasmuch as, in consequence of the said decree of affirmance, the said court of common pleas hath no jurisdiction to review the same, and the record of the said cause is not now remaining in this honourable court, your orator ought to have allowed and granted to him a writ of certiorari, to remove the record of the said proceedings to this court, in order that the said decree of affirmance may be reviewed by your honours, and that as well the said decree of affirmance as the decree of the said court of common pleas may be here reversed and set aside. To the end, therefore, &c., (*interrogating as to the preceding statements, and particularly as to the matters alleged for reversing the decree.*) And that a writ of certiorari may be granted to your orator, directed to the judges of the said court of common pleas of the county of, &c., thereby commanding them to certify and remove the record of the proceedings in the said cause into this honourable court; and that the said decree of affirmance may be reviewed; and that the same, together with the decree of the said court of common pleas, may be reversed and set aside; and that the said defendant may be decreed to put your orator into possession of the said premises, and in the same situation in every respect, as your orator would have been, in case the said decrees had never been pronounced and executed; and that your orator may have such further and other relief, &c. May it please, &c.

BILL TO CARRY A DECREE INTO EXECUTION.

A. B., of, &c., brings this his bill against C. D., of, &c., and thereupon your orator complains and says; that on or about, &c., your orator filed his bill of complaint, &c., (*statement and prayer of the bill of partition*), and the said defendant having put in his answer thereto, and the said cause being at issue, the same came on to be heard before your honours, on, &c., when your honours were pleased to order and decree that a commission should issue to certain commissioners to be therein named, to make partition of the estate in question, who were to take the depositions of witnesses to be examined by them, in writing, and return the same, with the said commission; and the said estate was to be divided and separated, and one-third part thereof set out in severalty, and declared to belong to the said defendant and his heirs; and the remaining two-third parts thereof, declared to belong absolutely to your orator, to be held in severalty by him and his heirs; and the respective parties were decreed to convey their several shares to each other, to hold in severalty according to their respective undivided shares thereof; and that it should be referred to G. H., one of the masters of this honourable court, to settle the conveyances in case the parties differed about the same; as by the said proceedings and decree, now remaining of record in this honourable court, reference being thereunto had, will more fully appear. And your orator further sheweth, that the commission awarded to issue, by the said decree, never did issue, on account of the said defendant going abroad, and being, till lately, out of the jurisdiction of this honourable court; but the said defendant having since returned, and the inconvenience mentioned in your orator's former bill still subsisting, your orator is desirous of having the said decree forthwith carried into execution, but from the great length of time that has elapsed, and the refusal of the said defendant to concur therein, your orator is advised the same cannot be done without the assistance of this honourable court. To the end, therefore, &c., (*interrogating as to the foregoing statements.*) And that the said decree may be directed to be carried specifically into execution; and the said defendant ordered to do and concur in all necessary acts for that purpose. May it please, &c.

CROSS BILL.

A. B., of, &c., brings this his bill against C. D., of, &c., and thereupon your orator complains and says; that the said defendant on or about, &c., exhibited his bill of complaint, in this honourable court, against your orator, thereby praying, &c., (*stating the prayer of the original bill*;) and your orator being duly served with process, appeared and put in his answer

thereto, to which the said defendant replied; and issue being thus joined, and witnesses examined, the said cause, according to the practice of the court, hath been set down for hearing, by the said defendant; as in and by the said bill, answer, and proceedings in the said cause, now remaining of record in this honourable court, reference being thereunto had, will more fully appear. And your orator further sheweth, that the said cause hath not yet been heard; and that, on or about, &c., the said defendant, by a certain deed or writing of release, bearing date, &c., did remise, release, and forever quit claim unto your orator, his heirs, executors, and administrators, the several matters and things complained of, in and by the said bill of the said defendant, and in question in the said suit, and each and every of them, and of all sums of money then due and owing, or thereafter to become due and owing, together with all and all manner of actions, causes of action, suits and demands whatsoever, both at law and in equity, or otherwise howsoever, which he, the said defendant, then had, or which he should or might at any time or times thereafter have, claim, allege, or demand, against your orator, for or by reason or means of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of the said deed or writing of release; as in and by the said release, now in your orator's possession, and to which, for greater certainty, he craves leave to refer, when produced, will more fully appear. And your orator hoped that in consequence of the said release, the said defendant would not have proceeded in the said suit against your orator; but notwithstanding the said release, the said defendant threatens and intends to proceed in the said suit, and to bring the said cause on for hearing in due course; and he pretends that no such release was ever executed by him, or if so, that the same was obtained by fraud and surprise, and therefore void; whereas your orator charges that the same was, in every respect, fairly and properly obtained by your orator, and duly executed by the said defendant. And your orator further charges, that under the circumstances aforesaid, he is unable to put the said release in issue, or to use the same in bar to the said suit. To the end, therefore, &c., (*interrogating as to the statements in the bill.*) And that the said release may be established, and declared by this honourable court, a sufficient bar to any further proceedings by the said defendant in the said suit; and that the bill of the said defendant therein, may, under the circumstances, be forthwith dismissed with costs; and that your orator may have such further and other relief, &c. May it please, &c.

PETITIONS.

PETITION FOR GUARDIAN AD LITEM.

To the honourable the judges of the court of common pleas of the county of, &c., sitting in equity.

The petition of A. B., of, &c., respectfully sheweth; that your petitioner is an infant, over the age of fourteen years, to wit, of the age of sixteen years and upwards. That a bill has been filed in this honourable court, by C. D., of, &c., against, &c., to procure, &c., (*here state the substance and prayer of the bill, so as to show the interest of the infant.*) And your petitioner further sheweth, that a subpœna was served upon him, requiring your petitioner to appear and answer the said bill, returnable, &c. Your petitioner, therefore, prays that J. W., of, &c., may be appointed the guardian *ad litem* of your petitioner, to appear and defend the said suit. And your petitioner will ever pray, &c.

PETITION FOR A REHEARING.

(*Title of the cause.*)

To, &c. The petition of G. H., the defendant in this cause, respectfully sheweth; that your petitioner is much aggrieved by a decree made in this cause, by this honourable court, on, &c., whereby your petitioner is ordered and decreed, &c., (*here state the substance of the decree.*) And your petitioner further sheweth, &c., (*here set forth the special matter or cause on which the rehearing is applied for.*) Your petitioner therefore prays that your honours will be pleased to vouchsafe a rehearing in this cause, before this honourable court; your petitioner submitting to pay such costs as the court shall award, in case his complaint shall be found groundless. And your petitioner will ever pray, &c.

PETITION FOR AN APPEAL.

A. B. and C. D., appellants,	} In the Supreme Court of Pennsylvania.
v.	
G. H., respondent.	

To the Honourable the Justices of the supreme court of Pennsylvania, sitting in equity, in and for the eastern district.

The petition of appeal of the above named A. B. and C. D., respectfully sheweth; that a decree was lately made in the court of common pleas, of the county of, &c., bearing date, &c., in a certain suit in equity, pending in the said court, wherein the said G. H. was complainant, and

your petitioners were defendants; by which decree it was, among other things, ordered, adjudged, and decreed, that, &c., (*setting forth so much of the decree as is sought to be reversed;*) which said decree of the said court of common pleas, in so much thereof as is herein above stated and set forth is, as these petitioners are advised, erroneous, and ought to be reversed. And your petitioners further show unto your honours, that on, &c., they entered in the said court of common pleas, an appeal from the said decree to this honourable court; and made the oath required by law, and gave security by recognisance, with sufficient surety, in the said court of common pleas, conditioned to prosecute the said appeal with effect, and to pay all costs that may be adjudged against them. Your petitioners, therefore, pray that a writ of *certiorari* may be granted to remove the record of the said cause to this honourable court, in order that the said appeal may be heard and determined; and that the said decree may, in the particulars aforesaid, be reversed and set aside; and that such other decree may be made by this honourable court, in the premises, as shall be agreeable to equity and good conscience. And your petitioners will ever pray, &c.

PETITION FOR LEAVE TO FILE A SUPPLEMENTAL BILL.

(*Title of the cause.*)

To, &c. The petition of, &c. That on or about, &c., your petitioner filed his bill in this court against, &c., stating in substance, among other things, &c., (*here insert the material allegations of the bill;*) and praying, &c., (*as in the prayer of the original bill.*) And your petitioner further sheweth, that the said defendant appeared to the said bill, and put in his answer thereto, &c., (*here state the proceedings in the cause.*) And your petitioner further sheweth, that before any further proceedings were had in the said cause, the said defendant, &c., (*here state the circumstances rendering the supplemental bill necessary;*) and your petitioner is advised, that it is necessary to bring the said S. T. before the court, as a party to this suit. Your petitioner, therefore, prays that leave may be granted him to file a supplemental bill against the said S. T., to make him a party defendant therein, with proper allegations, setting forth at large the facts and matters before stated, with all necessary and incidental matters, and all proper interrogatories adapted thereto, and with such prayer for relief in the premises as the case may require. And your petitioner, &c.

DEMURRERS.

FORMAL PARTS OF A DEMURRER.

1. *The Title.*

The demurrer of C. D., defendant, to the bill of complaint of A. B., complainant.

2. *The Introduction.*

This defendant, by protestation, not confessing or acknowledging all, or any of the matters and things in the said complainant's bill contained, to be true, in such manner and form as the same are therein set forth and alleged,* doth demur in law to the said bill, and for cause of demurrer sheweth, that, &c.

Where the Demurrer is to part of the bill, or to the relief.

This defendant, by protestation, &c., (*as in the last form to the asterisk*;) as to so much and such part of the said bill as seeks that this defendant may answer and set forth, whether, &c.; and whether, &c.; and prays, &c.; doth demur, and for cause of demurrer sheweth, that, &c.

3. *The Conclusion.*

Wherefore, and for divers other good causes of demurrer, appearing in the said bill, this defendant doth demur to the said bill, and to all the matters and things therein contained, and prays the judgment of this honourable court, whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his reasonable costs, in this behalf sustained.

Where the Demurrer is to part only, or to the relief.

Wherefore and for divers other good causes of demurrer appearing in the said bill, as to so much of the said complainant's bill as is demurred unto as aforesaid, this defendant doth demur, and prays the judgment of this honourable court, whether he shall be compelled to make any further or other answer to such part of the said bill as is so demurred unto as aforesaid; and prays, &c.

DEMURRER FOR WANT OF AN AFFIDAVIT.

That although the said complainant's said bill is, on the face thereof, a bill of interpleader, and prays that this defendant, and the other defendants thereto, may interplead together concerning the matters therein mentioned, and may be restrained by the order and injunction of this

honourable court, from proceeding at law against the said complainant, touching such matters; yet the said complainant hath not annexed an affidavit to his said bill, that he does not collude concerning such matters, or any of them, with this defendant and the other defendants thereto, or any or either of them; which affidavit ought, as this defendant is advised, to have been made by the said plaintiff, and annexed to the said bill; wherefore, &c.

DEMURRER FOR WANT OF EQUITY.

That the said complainant hath not, in and by his said bill, made or stated such a case as doth, or ought to entitle him, to any such discovery or relief as is thereby sought and prayed for, from or against this defendant; wherefore, &c.

DEMURRER FOR MULTIFARIOUSNESS.

That it appears by the said bill, that the same is exhibited by the said complainant against this defendant, and A. B., &c., as defendants thereto, for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is in no way interested; and by reason of such distinct matters, the said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof; and by joining distinct matters together, which do not depend on each other, the proceedings in the progress of the said suit will be intricate and prolix, and this defendant put to unnecessary charges and expenses, in matters which in no way relate to or concern him; wherefore, &c.

DEMURRER TO DISCOVERY.

That the said complainant hath not by his said bill, shown such privity of title between him and this defendant, or shown any such right or title as entitles him, in a court of equity, to the discovery from this defendant thereby sought; wherefore, &c.

P L E A S .

FORMAL PARTS OF A PLEA.

1. *The Title.*

The plea of C. D., defendant to the bill of complaint of A. B., complainant.

Or,

The joint and several plea of A. B. and C. D., defendants to the bill, &c.

Or,

The joint plea of A. B. and C. B., his wife, defendants, to the bill, &c.

Of Plea to part, and Answer to remainder.

The plea of A. B., defendant, to part of the bill of C. D. complainant, and the answer of the said A. B., to the remainder of the said bill of complaint.

Of Plea supported by an Answer.

The plea and answer of A. B., defendant, to the bill of complaint, &c.

2. *The Commencement of a Plea.*

This defendant, by protestation, not confessing or acknowledging all, or any of the matters and things, in the said complainant's bill of complaint mentioned and contained, to be true, in such sort, manner, and form, as the same are therein set forth and alleged, for plea to the whole of the said bill, &c.

Or,

To so much and such part of the said bill as prays, &c.—or, seeks a discovery from this defendant, whether, &c.

3. *The Conclusion.*

Therefore, this defendant doth plead the said (*act of assembly, &c., as the case may be,*) in bar to the said complainant's bill, (*or to so much of the said bill as hereinbefore particularly mentioned,*) and prays the judgment of this honourable court whether he shall be compelled to make any further answer to the said bill, (*or to so much of the said bill as is hereinbefore pleaded to,*) and prays to be hence dismissed with his reasonable costs and charges in that behalf most wrongfully sustained.

PLEA OF A FORMER SUIT PENDING.

That in the term of, &c., the said present complainant, exhibited his bill of complaint, in this honourable court, against this defendant, and one J. S., for an account of, &c., in the said complainant's present bill mentioned, and claiming such shares and proportions thereof, and such rights and interests therein, as he now claims by his present bill; and praying relief against this defendant, in the same manner, and for the same matters, and to the same effect, as the said complainant now prays by his said present bill; and this defendant and the said J. S., appeared and put in their answer to the said former bill, and the said complainant replied thereto, and witnesses were examined on both sides; and the said former bill and the several proceedings in the said former cause, as this defendant avers, now remain depending, and of record in this honourable

court, the said cause being yet undetermined and undismissed ; all which said several matters and things this defendant doth aver, and pleads the said former bill, answer, and the several proceedings in the said former suit, in bar to the said complainant's present bill; and prays, &c.

PLEA OF A STATED ACCOUNT.

This defendant, &c.; as to so much and such part of the complainant's bill as seeks an account of and concerning the dealings and transactions therein alleged to have taken place between the said complainant and this defendant, at any time before, &c.; this defendant for plea thereto saith, that on the said, &c., which was previously to the said bill of complaint being filed, the said complainant and this defendant did make up, state, and settle an account in writing, a counterpart whereof was then delivered to the said complainant, of all sums of money which this defendant had before that time, by the order and direction, and for the use of the said complainant received, and of all matters and things thereunto relating, or at any time before the said, &c., being or depending between the said complainant and this defendant, (and in respect whereof the said complainant's bill of complaint has been filed;) and the said complainant, after a strict examination of the said account, and every item and particular thereof, which this defendant avers, according to the best of his knowledge and belief, to be true and just, did approve and allow the same; and actually received from this defendant the sum of, &c., the balance of the said account, which by the said account appeared to be justly due to him from this defendant; and the said complainant thereupon, and on, &c., gave to this defendant a receipt or acquittance for the same, under his hand, in full of all demands; which said receipt or acquittance is in the words and figures following, that is to say; (*here set forth the receipt*;) as by the said receipt or acquittance, now in the possession of this defendant, and ready to be produced to this honourable court, will appear; therefore, &c.

PLEA OF A RELEASE.

This defendant, &c.; as to so much and such part of the said complainant's bill as seeks an account of the several dealings and transactions between the said complainant and this defendant, previously and up to, &c., and prays that the balance, if any, which shall be found due, upon taking said account, from this defendant, may be paid by him to the said complainant; this defendant doth plead thereto, and for plea saith, that previously to the said complainant's bill being filed, that is to say on, &c., the said complainant, in consideration of the sum of, &c., then paid to

him by this defendant, by a certain writing of release under his hand, and sealed with his seal, ready to be produced to this honourable court, did, for himself, his executors and administrators, remise, release, and forever quit claim unto this defendant, his heirs, excutors, and administrators, (among other things) the several matters and things in the said complainant's bill mentioned and complained of, (an account whereof is thereby sought against this defendant as aforesaid,) and all suits and demands whatsoever, both at law and in equity, which the said complainant then had, or might thereafter have in respect of the several dealings and transactions, matters and things, in the said bill mentioned, or any of them; and this defendant avers, that the said release was freely, fairly, and voluntarily given and executed by the said complainant, on the day the same bears date; and that the said complainant well knew the nature and effect thereof previously to giving and executing the same; and that the sum of, &c., so paid by this defendant to the said complainant as aforesaid, was a full and fair equivalent for any demand which the said complainant could or might have against this defendant, in respect of the several matters therein, and in the said bill also mentioned, or any of them. Therefore, this defendant pleads the said release in bar to so much of the said complainant's bill, as is hereinbefore particularly mentioned, and prays the judgment of this honourable court, whether he ought to be compelled to make any further answer to so much of the said bill, as is before pleaded unto. And this defendant, not waiving his said plea, but insisting thereon, for answer to the residue of the said bill, and in support of his said plea, saith, he denies that the said release was unduly obtained by this defendant from the said complainant, or that the said complainant was ignorant of the nature and effect of such release, or that the consideration paid by this defendant to induce the said complainant to execute the same, was at all inadequate to the just claims and demands of the said complainant against this defendant, in respect of the several dealings and transactions in the said bill mentioned, or any of them; and this defendant denies, &c.

PLEA OF THE STATUTE OF LIMITATIONS.

This defendant, &c.; as to so much of the said bill as seeks an account and discovery of, &c., this defendant pleads thereto, and for plea saith, that by an act of the general assembly of this commonwealth, passed, &c., entitled, &c., it was enacted, &c.; and this defendant further pleadeth, that if the said complainant ever had any cause of action or suit against this defendant, for or concerning any of the matters in the aforesaid bill of complaint mentioned, which this defendant doth in no wise admit,

such cause of action or suit did accrue or arise above six years before the said bill was filed, or this defendant served with process to appear and answer the same; and the said complainant was not at any time within upwards of six years before the serving or suing out of process against this defendant, under any of the disabilities mentioned and described in the said act of assembly. And this defendant for further plea saith, that he, this defendant, did not at any time within six years before exhibiting the said bill, or serving or suing out process against him to appear and answer the same, promise or agree to come to any account for, or to pay, or any way satisfy the said complainant, any sum or sums of money, for or by reason of any matters, transactions, or things, in the complainant's said bill of complaint charged or alleged. All which matters and things this defendant doth aver to be true, and is ready and willing to maintain and prove as this honourable court shall award; and he doth plead the same in bar to so much of the complainant's said demand, as aforesaid, and prays the judgment of this honourable court, whether, &c. And this defendant for answer, &c.

PLEA OF PURCHASE FOR A VALUABLE CONSIDERATION WITHOUT NOTICE.

This defendant, &c.; as to so much of the said bill as seeks an account of what is due and owing to the said complainant, in respect of the annuity of, &c., therein mentioned, and stated to be charged upon, and issuing out of the hereditaments and premises therein and hereinafter mentioned, this defendant doth plead thereto, and for plea saith, that A. B. previously to and on, &c., was, or pretended to be, seised in fee simple, and was in, or pretended to be in, the actual possession of all those lands in the said bill particularly mentioned and described, free from all incumbrances whatever; and this defendant, believing that the said A. B. was so seised and entitled, and that the said hereditaments and premises were in fact free from all incumbrances, on, &c., agreed with the said A. B. for the absolute purchase of the fee simple and inheritance thereof; whereupon a certain indenture, bearing date on, &c., between the said A. B. of the one part, and this defendant of the other part, was duly made and executed, whereby the said A. B., in consideration of the sum of, &c., paid to him by this defendant, did grant, bargain, sell, release, and confirm unto this defendant, all, &c., (*describing the premises from the deed*), to hold unto, and to the use of, this defendant, his heirs and assigns forever; as in and by the said indenture, reference being thereunto had, will more fully appear; and this defendant doth aver, that the said sum of, &c., the consideration money in the said indenture men-

tioned, was actually paid by this defendant to the said A. B., at the time the said indenture bears date; and this defendant doth also aver, that at or before the time of the execution of the said indenture, and of the payment of the said purchase money, he, this defendant, had no notice whatsoever of the said annuity of, &c., now claimed by the said complainant, or of any other incumbrance whatsoever, that in any wise affected the said hereditaments and premises, so purchased by this defendant, as aforesaid, or any of them, or any part thereof; and this defendant insists that he is a *bonâ fide* purchaser of the said hereditaments and premises for a good and valuable consideration, and without any notice of the said annuity claimed by the complainant; all which matters and things this defendant doth aver and plead in bar to so much of the said complainant's bill as is hereinbefore particularly mentioned; and prays the judgment of this honourable court whether he should make any further answer to so much of the said bill as is hereinbefore pleaded to; and this defendant, not waiving his said plea, but relying thereon, and for better supporting the same, for answer saith, that he had not at any time before, or at the time of purchasing the said hereditaments and premises, or since, until the said complainant's bill was filed, any notice whatsoever, either express or implied, of the said annuity of, &c., claimed by the said complainant, or that the same or any other incumbrance whatsoever was charged upon, or in any wise affected the said hereditaments and premises, so purchased as aforesaid, or any of them, or any part thereof; and this defendant denies, &c.

DISCLAIMERS.

A DISCLAIMER.

The disclaimer of A. B., the defendant, to the bill of complaint of C. D., the complainant.

This defendant saving, &c., (*here follow the words of course which precede an answer*;) saith, that he doth not know, that he, this defendant, to his knowledge and belief, ever had, nor did he claim or pretend to have, nor doth he now claim, any right, title, or interest of, in, or to the estates and premises, situate, &c., in the said complainant's bill mentioned, or any part thereof. (*Here follow the words of course, which conclude an answer.*)

ANSWER AND DISCLAIMER.

The answer and disclaimer of, &c. This defendant saving, &c., saith, that he, this defendant, on behalf of E. F., one of the other defendants in the said bill named, did, about fifteen years ago, contract and agree with G. H., for the purchase of the messuage or tenement, &c., now in question, and in possession of L. M., in the said bill also named, and another defendant thereto, which said messuage, &c., at that time was, and for upwards of, &c., before, had been in the possession of the said G. H., and J. K., in the said bill also named, or one of them, and for the purchase whereof, this defendant, on behalf of the said defendant E. F., agreed to give, and accordingly did give and pay to the said G. H., the sum of, &c., which was the full and real value thereof; and in consideration thereof, the said G. H., and N., his wife, by indenture, bearing date, &c., duly conveyed the said messuage, &c., to the said E. F., who thereupon, and under and by virtue of such conveyance, as this defendant has heard and believes, entered on, and became seised of the said messuage, &c., and continued so seised thereof, without any entry or claim made by the said complainant, or any other person or persons, until, &c., when the said E. F., as this defendant hath heard and believes, by good and sufficient conveyances in the law, and in consideration of the sum of, &c., *bonâ fide* paid, sold and conveyed the said messuage, &c., to the said defendant L. M., and his heirs, who thereupon entered thereon, and was, and yet is, seised and possessed of the same; and this defendant further answering saith, he does not know, nor can he set forth as to his belief or otherwise, whether R. S., in the said bill named, was ever seised of the said premises, or any part thereof; and this defendant further answering saith, he has been advised and believes, that the said G. H., and N., his wife, had good right and title to sell and convey the said premises, so purchased by this defendant, on behalf of the said E. F., as aforesaid. And this defendant further answering saith, he denies that he ever had any notice of any right or title, the said complainant, or any other person, save as aforesaid, had, or might, or could claim, of, in, or to the said messuage, &c., or any part thereof. And this defendant saith, that he never had, or claimed, or pretended to have, nor has he now, nor does he claim or pretend to have, any right, title, or interest, of, in, or to the said premises, or any part thereof; and this defendant disclaims all right and title, of, in, or to the same, and any part thereof, &c.

ANSWERS.

FORMAL PARTS OF AN ANSWER.

1. *The Title.*

The answer of A. B., the defendant, to the bill of complaint of C. D., complainant.

Further Answer, where the Bill has been amended.

The further answer of A. B., one of the defendants, to the original bill, and his answer to the amended bill of complaint of C. D., complainant.

2. *The Commencement.*

This defendant, now and at all times hereafter, saving and reserving unto himself, all benefit and advantage of exception which can or may be had to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained; for answer thereunto, or unto so much, and such parts thereof, as this defendant is advised, is or are material or necessary for him to make answer unto, this defendant answering saith, &c.

3. *Forms used in framing Answers.*

Admission of a statement.

And this defendant further answering saith, he hath been informed, and believes it to be true that, &c. *Or*, this defendant admits that, &c.

Admission of a statement of a written instrument.

And this defendant further saith, he hath been informed and believes it to be true that, &c., but this defendant, for greater certainty therein, craves leave to refer to the said, &c., when the same shall be produced.

Qualified admission.

And this defendant further saith, he hath never heard or been informed, save by the said complainant's bill, whether, &c., but this defendant believes that, &c., as in the said bill is alleged.

Where defendant is ignorant of the matters inquired of.

And this defendant further answering saith, he knows not, and has not been informed, save by the said complainant's bill, and cannot set forth as to his belief or otherwise, whether, &c.

Where one defendant denies, and the other believes such denial.

And this defendant A. B., further severally answering saith, he denies, and this defendant C. D., believes such denial to be true, that, &c.

4. *The Conclusion.*

And this defendant denies all and all manner of unlawful combination and confederacy whether he is by the said bill charged, without this, that there is any other matter, cause, or thing, in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honourable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained.

ANSWER OF AN INFANT.

The answer of A. B., an infant under the age of twenty-one years, by C. D., her guardian, one of the defendants to the bill of complaint of E. F., complainant. This defendant answering by her said guardian, saith, that she is a stranger to all and singular the matters and things in the said bill of complaint contained; that this defendant is an infant under the age of twenty-one years, and claims such interests in the premises, as she is entitled to, and submits her interests to the protection of this honourable court.

ANSWER OF A TRUSTEE.

This defendant, &c., admits it to be true that such an indenture, as in the said bill of complaint is stated to bear date, &c., was duly made and executed, by and between such parties, and to such purport or effect as is therein set forth, so far as the same is therein set forth; but for greater certainty, nevertheless, this defendant craves leave to refer to the said indenture, when produced. And this defendant further answering saith, he admits it to be true that the intended marriage between the said complainants A. B., and C. B. was soon afterwards had and solemnized, and that the said other complainants, are the only children of the said marriage. And this defendant admits that he doth decline to act in the trusts of the said settlement, and that he is desirous of being discharged therefrom, and that he is ready to convey and release the said trust premises to the said complainant S. M. M., and such new trustee as may be appointed by this honourable court, on being indemnified in that behalf, and paid all his costs and expenses.

ANSWER INSISTING ON THE BENEFIT OF THE STATUTE OF FRAUDS.

That by a certain act of assembly of this commonwealth, made and passed on the twenty-first day of March, one thousand seven hundred

and seventy-two, entitled "an act for the prevention of frauds and perjuries," and commonly called the statute of frauds, all contracts and agreements in relation to lands, except as therein is excepted, are required to be reduced into writing, and signed by the party or parties to be bound thereby; and that the said agreement in the said bill mentioned, and therein alleged to have been made and entered into by this defendant and the said complainant, was not reduced into writing and executed pursuant to the said statute; and therefore, this defendant insists, that the same is void as against this defendant, and that he cannot be affected thereby; and this defendant claims the same benefit as if he had pleaded the same statute in this cause; and this defendant, for the reasons, and under the circumstances aforesaid, is advised and insists, that the said complainant is not entitled to any relief against this defendant, touching the matters complained of in the said bill. And this defendant denies, &c.¹

REPLICATION.

The replication of A. B., complainant, to the answer of C. D., defendant. This repliant, saving and reserving unto himself all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, certain, and sufficient in the law, to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be ready to aver and prove as this honourable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

¹ It has not been thought necessary here to give any further precedents of answers to a bill in equity; an answer in chancery must necessarily be framed to meet the particular circumstances of the case, and but little advantage can be had by a reference to precedents. For these the reader may consult Curtis's Equity Precedents, and Hughes's Equity Draftsman.

EXCEPTIONS.

EXCEPTIONS TO AN ANSWER.

Exceptions taken by the said complainant to the insufficient answer of the said defendant, C. D., to the said complainant's bill of complaint.

1. For that the said defendant hath not to the best and utmost of his knowledge, remembrance, information, and belief, answered and set forth, whether, &c.

2. For that the said defendant hath not in manner aforesaid, answered and set forth, whether, &c.

In all which particulars, the said complainant excepts to the answer of the said defendant, C. D., as evasive, imperfect, and insufficient; and humbly prays that the said defendant may be compelled to put in a full and sufficient answer thereto.

EXCEPTIONS TO A MASTER'S REPORT.

Exceptions taken by the said A. B., one of the defendants in the said bill of complaint named, to the report of J. S. H., Esquire, one of the masters of this honourable court, to whom the said cause stands referred, made in pursuance of the decree made on the hearing of the said cause, bearing date, &c.

1. For that the said master hath, in and by his said report, certified that he has charged this defendant, &c.; whereas the said master ought to have certified that he found this defendant had expended the further sum of, &c.

2. For that the said master hath in and by his said report certified that, &c.

Wherefore the said A. B., excepts to the said master's report, and humbly appeals therefrom to the judgment of this honourable court.

INTERROGATORIES.

THE TITLE.

Interrogatories to be administered to witnesses to be produced, sworn, and examined, in a certain cause now depending and at issue in the court of common pleas of the county of, &c., sitting in equity, wherein A. B. is complainant, and C. D. is defendant, on the part of the said complain-

ant, (or defendant,) under a commission issued out of the said court directed to J. T. and L. C., of, &c., commissioners on the part of the complainant, (or, on the part as well of the said complainant, as of the said defendant.)

FIRST GENERAL INTERROGATORY.

1. Do you know the parties, complainant and defendant, (*or*, complainants and defendants,) in the title to these interrogatories named, or (any or) either, and which of them, and how long have you known them respectively, or such (one) of them as you do know? Declare the truth and your utmost knowledge, remembrance, and belief herein. *Or thus*: Declare the truth of the several matters inquired after by this interrogatory, according to the best of your knowledge, remembrance, and belief, with your reasons fully and at large.

THE CONCLUDING GENERAL INTERROGATORY.

Lastly. Do you know, or can you set forth, any other matter or thing, which may be a benefit and advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

WHEN REFERENCE IS MADE TO AN EXHIBIT.

Look upon the paper writing, now produced and shown to you, at this the time of your examination, marked with the letter (A.) declare whether, &c.

TO PROVE A STATED ACCOUNT.

Were you or not, present at any time, and when, at the stating of any and what account, between the said complainant and the said defendants, touching or concerning the estate and effects of the said testator R. F., in the pleadings of this cause named? If yea, was or were, or not, any account or accounts touching such estate or effects then settled between them; and was, or not, any, and what, balance then settled and ascertained as due to any, and which, of the said parties; and was, or not, such balance then paid over, and if not, why, and for what reason? Declare, &c.

TO PROVE THE BIRTH OF THE PLAINTIFF.

Do you know, and from what circumstances, when and where the said complainant A. B. was born? If yea, set forth the time and place of his birth; and the reasons of your knowledge therein; and who were his

father and mother, and where they usually resided at the time of the birth of the said complainant, and what was their situation in life. Declare, &c.

TO PROVE BOUNDARIES.

Are you or not acquainted with the piece or parcel of land, containing a stone quarry, in the pleadings of this cause mentioned to be situate at or near certain places called or known by the name of, &c., and, &c., in, &c., and near to the river, &c.? If yea, how long have you been acquainted therewith, and how is such piece of land bounded, and at what distance is the same situated from the said river, &c.? Look upon the map or plan, now produced and shown to you, at this, the time of your examination, marked with the letter (A.) what doth the same purport to be or contain; and does not the same contain a true and correct plan of the said piece or parcel of land, and quarry, and of the boundaries thereof, as you know, or do, for any, and what reason, believe? Declare, &c.

TO PROVE WHAT CHILDREN THE PLAINTIFFS HAVE.

Are you, or not, acquainted with the said complainants, A. B., and C., his wife? And if yea, are you acquainted with the state of the said complainants' family? What children or child have the said complainants now living, and what are, or is, the names or name of such children or child? Set forth all you know concerning the particulars inquired after by this interrogatory, and the reason for such your knowledge. Declare, &c.

TO PROVE A CONVERSATION.

Whether or not, were you at any time in the year, &c., and when and where, present with the said complainant and the said defendant, when any conversation passed between them respecting the public house called, &c., at, &c., in the occupation of the said complainant, and any agreement relating thereto? If yea, set forth the particulars of such conversation, and what was said therein by the said parties respectively, and whether the said complainant then offered to pay any, and what sum of money to the said defendant. Declare, &c.

TO PROVE LETTERS.

Whether or not, did you, at any time or times, and when, and on whose behalf, correspond by letters, or otherwise, and how, with the said defendant, C. B., or did you, or not, at any time or times, and how, and in what manner, and by what means, receive any letter or letters from him, with respect to, &c. And if yea, have you such letters, or any, and which

of them, in your possession, custody, or power, or what has become of the same respectively? If you are able, produce [such letters, and declare how, or in what manner, and by what means, the same, respectively, came into your possession; and whose hand-writing all such letters, respectively, are; and were, or were not the same, or any, or either, and which, of them ever, and when, and by whom, and on what occasion, produced or shown to the said defendant? If yea, in whose hand-writing, did he declare or admit the same, respectively, or any, and which of them, to be; and what is the purport or effect of such letters respectively? Declare, &c.

TO PROVE THE DEATH OF A PARTY.

Did you, or not, know J. S., in the pleadings of this cause named? If yea, is he living or dead; and, if dead, where, and when, did he die; and did you, or not, see him after he was dead; and where was he buried; and did you, or not, attend at his funeral; or how do you know that he is dead? Declare, &c.

TO PROVE THE DEATH OF SUBSCRIBING WITNESSES AND THEIR HAND-WRITING.

Did you know A. B. and C. D.? If yea, do you know whether they, or either, and which of them, be now living or dead? And if they are dead, when did they, respectively, die; and how do you know that they are both, or either of them, is dead? Declare particularly your reasons for knowing, or believing, that the said A. B. and C. D. are, or that either of them, and which of them, is dead. And are you acquainted with the character or manner of hand-writing of the said A. B. and C. D., or either, and which of them? If yea, look on the exhibit, marked with the letter (A.) and now produced and shown to you, at this, the time of your examination, and at the names of A. B. and C. D., indorsed thereon as witnesses to the sealing and delivering thereof, and declare whether the same be of the respective proper hand-writing of the said A. B. and C. D., as you know, or for any, and what reason, believe. Declare, &c.

TO PROVE THE RECEIPT OF DIVIDENDS.

Do you, or not, know, and if yea, how, and by what means, whether the said complainant A. B., ever, and where, and of whom, and in what manner, received any, and what sum or sums of money, and to what amount, for, or in respect, or on account of, the dividends due upon the sum of, &c., in the pleadings in this cause mentioned; and, in particular, do you know whether he received such dividends, or any part thereof, and from whom, subsequently to, &c.? Declare, &c.

TO PROVE A MARRIAGE.

Do you, or not, know whether the said A. B., deceased, and C. B., also deceased, in the pleadings of this cause named, did, at any time, and when, intermarry together, or not? If yea, were you present at such marriage ceremony, and by whom, and in the presence of what witnesses, and when, and on what day in particular, was such marriage solemnized? Declare, &c.

INTERLOCUTORY ORDERS.

ORDER FOR INJUNCTION.

On filing the bill of complaint in this cause, and the said complainant having this day given bond, &c., as required by the act of assembly, in such case made and provided, it is, on motion of, &c., ordered, that an injunction issue, pursuant to the prayer of the said bill.

ORDER FOR EXAMINATION PRO INTERESSE SUO.

It appearing to this court, that by an order made in this cause, wherein, &c., dated, &c., it was ordered, that a commission of sequestration should issue, directed, &c., and that a commission issued accordingly. And it also appearing, by the certificate of, &c., two of the sequestrators named in such commission, that they had taken possession of a certain messuage and premises, situate, &c., as part of the real estate of the said defendant; since which A. B. has claimed title to such premises, by virtue of a certain deed or conveyance thereof, made and executed, as alleged by the said defendant, to the said A. B., and dated, &c., and otherwise; and that the said A. B. has brought an ejectment in the court of, &c., against the said, &c., the said sequestrators, for recovering the possession of such premises; thereupon, on reading such order, and reading and filing such certificate, (and also an affidavit of the said A. B.) and upon motion of, &c., of counsel for the plaintiff, and hearing what was alleged by, &c., of counsel for the said A. B., it is ordered, that all proceedings on such ejectment be stayed by an injunction to be issued out of and under the seal of this court. And it is further ordered, upon the consent of the said A. B., by his counsel, that the said A. B. do come in and be examined, *pro interesse suo*, before, &c., one of the masters of this court, touching his title and interest by him claimed, in and to the messuage and premises so sequestered; and the plaintiffs are to file interrogatories for that purpose, within a week before such master

who is hereby authorized to examine the said A. B. upon the same; and if a replication be filed to such examination, then he is also to examine any other persons as witnesses touching such claim. And the said A. B. is also to produce before the master all deeds, documents, and evidences, relating to his interest in such premises. And it is further ordered, that the said master do certify whether the said A. B. hath made out a title to the said premises, or any or what interest therein, and that he report with all convenient speed, to the end that such further order may be made in the premises as shall be just.

ORDER FOR SECURITY FOR COSTS.

It appearing to the court, that A. B., the complainant in this cause, resides out of the state of Pennsylvania, to wit in, &c.; it is, thereupon, on motion of, &c., of counsel for the said defendant, ordered that the said defendant give security for costs in this cause; and that until this order be complied with, all further proceedings in the cause be stayed.

ORDER TO AMEND BILL.

No appearance having been entered for either of the defendants in this cause, on motion of, &c., of counsel for the complainant, it is ordered, that the said complainant be, and he is hereby authorized to amend his bill filed in this cause, as he shall be advised.

ORDER TO DISMISS ON PLAINTIFF'S APPLICATION.

The complainant being advised to dismiss his bill in this cause; thereupon, on motion of, &c., of counsel for the said complainant, it is ordered, that the same be dismissed. And it is further ordered, that the complainant pay to the defendants their costs in this cause, to be taxed.

ORDER THAT PLAINTIFF ELECT.

It appearing that the complainant prosecutes the defendant, both at law and in this court, for one and the same matter, whereby he is doubly vexed; therefore, on motion of, &c., it is ordered, that the complainant, within eight days after notice of this order, elect whether he will proceed at law in the suit brought by him against the defendant, or in this court upon his bill; and if he elect to proceed at law, or if he neglect to file such election, within the said eight days, the bill in this cause shall thereupon stand dismissed with costs; and if he elect to proceed here, it is then further ordered that he proceed no further in the said suit at law, without leave of this court. (*And in such case an injunction may issue to stay such proceedings.*)

ORDER FOR EXAMINATION OF A PARTY.

On filing an affidavit of A. B., one of the above named complainants, setting forth that the defendant, G. H., is a material witness for him in this cause, and is not interested in the matter to which he is to be examined; on motion of, &c., it is ordered, that the said complainants may examine the said G. H., as a witness, to any matter to which he is not interested, subject to all just exceptions.

DECREES.

THE COMMENCEMENT.

This cause came on to be heard, (or to be further heard, as the case may be,) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed, as follows, viz.: (*here insert the decree or order.*)

REFERENCE TO THE MASTER.

That it be referred to, &c., one of the masters, &c., to inquire and state to the court, &c. And for the better discovery of the matters aforesaid, the parties are to produce before the said master, upon oath, all books, papers, and writings, in their custody or power, relating thereto, and are to be examined upon interrogations as the said master shall direct.

Liberty to state special circumstances.

And the master is to be at liberty to state any special circumstances.

Further directions.

And the court doth reserve the consideration of all further directions, until the said master shall have made his report.

Liberty to apply.

And any of the parties are to be at liberty to apply to the court as occasion shall require.

DECREE FOR ACCOUNT.

That it be referred to, &c., one of the masters of this court, to take a mutual account of all dealings and transactions between the plaintiff and the defendant, for the better taking of which account, the parties are to produce, &c., as the said master shall direct; who, in taking the said

account, is to make unto the parties all just allowances; and what, upon the balance of the said account, shall appear to be due from either party to the other, is to be paid as the said master shall direct. And it is further ordered, that the injunction formerly granted in this cause, for stay of the defendant's proceedings at law, be in the meantime continued, and the defendant's judgment is to stand as security for payment of what, if any thing, shall appear to be coming to him, on the balance of the said account; and the court doth reserve the consideration of the costs of this suit, and of all further directions, until after the said master shall have made his report, when either side is to be at liberty to apply, &c.

Direction for allowing stated Account.

And if, in taking the said account, the said master shall find any account stated, he is not to ravel into the same.

Liberty to surcharge and falsify.

That the account stated on, &c., between the plaintiff and the defendant, do stand, with liberty to either side to falsify or surcharge the same. And it is hereby referred to, &c., to take a general account of all dealings and transactions between the said plaintiff and defendant, from the foot of the said account; and that the said master do likewise take an account of what is due for principal and interest on the bond in question, (*which had been given for the balance of the stated account*) and that the same be brought into the general account, and if in taking the said account between the parties, the master shall find the said defendant debtor to the plaintiff in the said general account, at any particular period of time, and after that time, the plaintiff does not become debtor to the defendant in the said general account, then, from such period of time, that the said master do apply what shall be coming due from the defendant to the plaintiff, first, to pay the interest on the said bond, and then to sink the principal. And it is ordered, that what shall appear to be due from either party to the other on the balance of the said account, be paid, &c.

DECREE FOR THE REDEMPTION OF GOODS PLEDGED.

That it be referred to, &c., to take an account of what remained due on, &c., the date of the last note exhibited in this cause, for principal and interest of the money advanced and lent by the defendant to the said W. C., the bankrupt,¹ on the pledge of the jewels, plate, and effects,

¹ The plaintiff was the assignee of the bankrupt.

mentioned in the original note from the defendant to the said W. C., dated, &c., and to carry interest on so much of the principal as remained due. And it is further ordered, that the said master do likewise take an account of the said jewels, plate, and effects, specified in the last mentioned note, and see which of them remain *in specie*, in the custody or power of the defendant, and what part thereof hath been sold or otherwise disposed of by the defendant. And as to such part thereof, as hath been so sold or disposed of, it is further ordered, that the said master do take an account of the real value thereof; and that the value of such amount thereof as hath been so sold or disposed of by the defendant be applied in the first place towards paying the interest, and then towards sinking the principal of what shall be so found to have been due to the defendant for the money lent or advanced by him as aforesaid. And if upon the balance of the said account, any thing shall be found to remain due to the defendant for principal or interest, then, on payment thereof, as the said master shall appoint, it is further ordered, that the defendant do deliver to the plaintiff such part of the said jewels, plate, and effects, as shall be found to remain *in specie*. But in default of such payment, by the plaintiff to the defendant as aforesaid, it is further ordered, that the said plaintiff's bill do from thenceforth stand dismissed out of this court, with costs to be taxed by the said master. And in case it shall appear on the said account, that the defendant is overpaid his said principal and interest, then it is further ordered, that the said defendant do pay to the plaintiff so much as shall remain due to the plaintiff on the said account, and also do deliver to the plaintiff such part of the said jewels, plate, and effects as shall remain, *in specie*, to be applied as part of the personal estate of the bankrupt, for the benefit of the creditors seeking relief under the said decree. And the court doth reserve the consideration of interest of any money that may be found due from the defendant to the plaintiff, in case there shall be any such, and also the consideration of costs, till after the said master shall have made his report. And for the better taking of the aforesaid accounts, &c. And any of the parties are at liberty to apply, &c.

DECREE FOR PARTITION.

That a partition be made of the lands, tenements, and hereditaments in question in this cause, with the appurtenances, in two moieties, between the plaintiff and the defendant; and that a commission do issue to certain commissioners to be therein named for that purpose. And it is ordered, that the said commissioners do respectively make a division of the said lands, tenements, and hereditaments, with the appurtenances,

into two equal moieties, and make the same by metes and bounds where they shall see occasion, if the same can be so divided, without prejudice to the interest of the said parties, respectively; but if the same cannot be so divided without prejudice to the interest of the said parties, the said commissioners are to value and appraise the same. And all deeds and writings, surveys and muniments relating to the said premises, in the custody or power of any of the parties, are to be produced before the said commissioners, on oath, as the said commissioners shall direct. And it is further ordered, that the said commissioners do examine witnesses on interrogatories, or otherwise, relating to the matters in question, as they shall think fit. And if the said commissioners shall make such division, then it is further ordered, that they do allot one moiety of the said premises to the plaintiff to be enjoyed by him, his heirs and assigns, in severalty, forever; and the other moiety thereof to the defendant, to be enjoyed by him, his heirs and assigns, in severalty, forever. And after such partition shall have been made, it is further ordered, that the said plaintiff and the said defendant, do convey such several moieties to each other respectively, to be held by them, their respective heirs and assigns, in severalty, forever. And after the commissioners shall have made such partition and returned the same, it is further ordered, that such of the deeds and writings in the custody or power of any of the parties as relate to such part of the premises, as shall, by such division, be allotted to either of the parties alone, be delivered to them respectively; and as to those that concern any parts of the premises that shall be so allotted to one of the said parties jointly with those allotted to the other, any of the said parties are to be at liberty to apply to the said court for directions concerning the same. But if the said premises cannot be so divided without prejudice to the interests of the said parties, then it is ordered, that the said commissioners do so return to this court, with a valuation or appraisement of the same, and that the said premises be sold subject to the approval of this court to the best purchaser or purchasers that can be got for the same, and that the said parties do convey the said premises to the purchaser or purchasers thereof, in fee simple; and that the proceeds of such sale be equally divided between the said parties. And any of the parties are to be at liberty to apply to the court for further directions concerning such sale and conveyance. And it is further ordered, that the costs of the partition before directed, be borne in equal moieties by the said parties, according to their respective interests in the premises.

DECREE FOR SPECIFIC PERFORMANCE.

That the agreement in the pleadings mentioned, dated, &c., be specifically performed and carried into execution; and it is ordered, that the said defendant do, on or before, &c., execute a good and sufficient conveyance of the premises in the said agreement mentioned to the said plaintiff, his heirs and assigns, in fee simple, according to the terms of the said agreement. And upon the said defendant executing and delivering to the plaintiff such conveyance of the said premises as aforesaid, it is ordered, that the said plaintiff pay to the defendant the sum of, &c., the residue of the purchase money in the said agreement mentioned. And the court doth not think fit to give any costs on either side. And any of the parties are to be at liberty to apply, &c.

DECREE FOR DOWER.

That it be referred to, &c., one of the masters, &c., to inquire what freehold lands the said S. M. died seised of, wherein the said plaintiff is dowable; and that the said master do assign to the plaintiff her dower in such freehold lands and tenements. And the said master is to assign and set out particular lands and tenements for that purpose; and after the said lands and tenements shall be set out and ascertained, it is ordered, that the said defendant do deliver possession to the said plaintiff, of the lands and tenements that shall be so set out and ascertained, for the said dower of the said plaintiff; and the tenants thereof are to attorn and pay their rents to the said plaintiff. And it is ordered and decreed, that the said master do take an account of the said freehold lands and tenements, whereof the said S. M. died seised, accrued since the death of the said S. M., which have been received by the said defendant, or by any other person, by his order or for his use. And that one-third part of what shall be coming on the said account, of rents and profits of such freehold lands and tenements, be paid to the plaintiff by the said defendant, in respect of her dower out of such lands and tenements: and for the better taking of the said accounts, &c. And it is ordered, that the defendant do pay unto the plaintiff her costs of this suit, to this time, to be taxed by the said master, of which the said master is to make a separate report. And the court doth reserve the consideration of the subsequent costs, as between the said parties until after, &c.

Direction for day to show cause against decree.

And this decree is to be binding upon the said defendant R. S., the infant, unless he, being served with a subpoena to show cause against the same, shall, within six months after he shall attain his age of twenty-one years, show unto this court good cause to the contrary.

DECREE FOR PERPETUAL INJUNCTION.

That the injunction formerly granted in this case, to restrain the defendants, &c., be made perpetual. And it is further ordered, that the defendants do pay to the plaintiff his costs of suit, to be taxed, &c.

DECREE OF REVERSAL ON APPEAL.

This cause came on for hearing on an appeal from the decree of the district court of, &c., and was argued by counsel, at, &c., and re-argued at, &c., and now, on mature consideration thereof, it is ordered, adjudged, and decreed, that the said decree of the district court be reversed and set aside; and that the plaintiff's bill be dismissed at his costs; and it is further ordered, that the receiver appointed by the said district court, *pendente lite*, do account with the plaintiff, under the direction of the said court, for the rents and profits of the land in controversy, which have been or ought to have been received by him, by virtue of his appointment; and the cause is remanded to the said district court, with directions to carry this decree into execution.

PROCESS.

WRIT OF ATTACHMENT.

County of, &c.

The Commonwealth of Pennsylvania, to the sheriff of the county of, &c., greeting:

We command you to attach A. B., so as to have him before our judges, at, &c., in our court of common pleas for the county of, &c., there to answer us, as well touching a contempt which he, as is alleged, hath committed against us, (*in not appearing to a certain bill of complaint exhibited against him in our said court, by C. D.*) as also such other matters as shall then be laid to his charge; and further to abide such order as our said court shall make in his behalf; and hereof fail not, and bring with you this writ. Witness, &c.

WRIT OF SEQUESTRATION.

The Commonwealth, &c., to A. B., and C. D., &c. Whereas, J. S., complainant, lately exhibited his bill of complaint in our court of common pleas for the county of, &c., against E. W., defendant; and whereas the said defendant, being duly served with a writ of subpoena issuing out

of our said court, commanding him, under the penalty therein mentioned, to appear and answer the said bill, has refused so to do, and thereupon our process of contempt has issued against him, to the sheriff of the said county of, &c., directed. And whereas, the said defendant hath of late absconded and so concealed himself, that the said sheriff hath not been able to find him, as by the certificate of the said sheriff appears. Know ye, therefore, that we, in consideration of your prudence and fidelity, have given, and by these presents do give to you, or any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said defendant, and to take, collect, receive, and sequester into your hands, not only all the rents and profits of the said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estate, whatsoever: and therefore, we command you, any three or two of you, that you do, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estate of the said defendant; and that you do collect, take, and get into your hands, not only all the rents and profits of his real estate, but also, all his goods, chattels, and personal estate, and keep the same under sequestration in your hands, until the said defendant shall fully answer the said complainant's bill, and clear his contempts, and our said court make other order to the contrary. Witness, &c.

WRIT OF INJUNCTION.

The Commonwealth, &c. To A. B., and his workmen, labourers, servants, and agents, and each and every of them, greeting: Whereas it hath been represented unto us, in our court of common pleas for the county of, &c., in a certain cause there depending, wherein C. D. is complainant, and you, the said A. B., are defendant, on the part of the said complainant, that, &c., (*as in the order.*) We, therefore, in consideration of the premises aforesaid, do strictly enjoin and command you, the said A. B., and your workmen, labourers, servants, and agents, and all and every one of you, under the penalty of five thousand dollars, to be levied upon your, and each and every of your lands, goods, and chattels, to our use; that you, and every one of you, do from henceforth altogether absolutely desist from felling or cutting down any timber or other trees, growing or being in or upon the premises in question, or from committing or doing any other or further waste or spoil in or upon the said premises, or any part thereof, until our said court shall make other order to the contrary. Witness, &c.

WRIT OF ASSISTANCE.

The Commonwealth, &c., to the sheriff of the county of, &c., greeting: Whereas C. D., of, &c., by our writ of injunction issuing out of our court of common pleas for the county of, &c., in pursuance of a certain order made in our said court, in a cause between A. B., complainant, and the said C. D., defendant, dated, &c., was commanded and enjoined, that he should deliver up the possession of the lands and tenements in question in this cause to A. B., the said complainant, according to a certain decree or order of our said court, lately made and rendered, dated, &c. Now, since it hath been shown to us, in our said court, that the said C. D. hath refused to obey the command in our said writ of injunction contained; know you, that in pursuance of an order made in our said court, between the parties aforesaid, on, &c.; we have given, and by these presents, do give you full power and authority, immediately after the reception of this writ, and do hereby command you, to go and enter into and upon the premises in our aforesaid decree mentioned and expressed, and known and described as follows, to wit, all, &c.; and that you eject and remove therefrom, all and every person or persons, holding possession of the same against the tenor of the said decree, and our writ of injunction aforesaid. And that you put and establish the above named complainant, or his assigns, in full and peaceable possession of the said premises; and that you, from time to time, as often as shall be necessary, preserve and defend the said complainant, his heirs and assigns, in such possession of the aforesaid premises, against all force and interruption whatsoever, according to the true intent and meaning of our decree and writ of injunction aforesaid. Witness, &c.

 RULES OF EQUITY PRACTICE.

FOR THE SUPREME COURT, AND THE SEVERAL COURTS OF COMMON PLEAS OF THE STATE OF PENNSYLVANIA.

ADOPTED AND PROMULGATED BY THE SUPREME COURT, MARCH TERM, 1844.

Preliminary Regulations.

I. The equity side of the supreme court and courts of common pleas shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory

motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

II. The prothonotary's office shall be open, and the prothonotary shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

III. Any judge of the supreme court or courts of common pleas, as well in vacation, as in term, may, at chambers, or on the rule days, at the prothonotary's office, make and direct all such interlocutory orders, rules, and other proceedings preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

IV. All motions, rules, orders, and other proceedings made and directed at chambers, or on rule days, at the prothonotary's office, whether special or of course, shall be entered by the prothonotary in his equity docket, to be kept at the prothonotary's office, on the day when they are made and directed—which book shall be open at all office hours to the free inspection of the parties in any suit in equity and their solicitors. And notice thereof given to the solicitors shall be deemed notice to the parties for whom they appear, and whom they represent in all cases where personal notice on the parties is not otherwise specially required.

V. All motions and applications in the prothonotary's office for the issuing of mesne process, and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the prothonotary's office, which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course, by the prothonotary of the court; but the same may be suspended, or altered, or rescinded by any judge of the court, upon cause shown.

VI. All motions for rules or orders, and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the equity docket, and shall be heard at the rule day next after that on which the motion is made; and if the adverse party, or his solicitor,

shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court, *ex parte*, and granted, as if not objected to, or refused, in his discretion.

Process.

VII. The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

VIII. Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the same court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds, or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff filed in the prothonotary's office, that the same has not been complied with within the prescribed time, the prothonotary shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree, and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

IX. When any decree or order is for the delivery of possession, upon proof made, by affidavit, of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the prothonotary of the court.

X. Every person, not being a party in any cause, who has obtained an order, or in whose favour an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order, as if he were a party in the cause.

Service of Process.

XI. No process of subpoena shall issue from the prothonotary's office in any suit in equity, until the bill is filed.

XII. Whenever a bill is filed, the prothonotary shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the prothonotary's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the prothonotary's office, on or before the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*. When there are more defendants than one, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

XIII. The service of all subpoenas shall be in the same manner as writs of summons are directed by law to be served. In cases where husband and wife are defendants, service on the husband shall be deemed a sufficient service on both.

XIV. Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against such defendant, if he shall require it, until due service is made.

XV. Upon issuing the subpoena, the prothonotary shall enter the suit upon his docket as pending in the court, and shall state the time of the entry, and upon the return thereof such return.

Appearance.

XVI. The appearance day of the defendant shall be the rule day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day when the process is returnable. The appearance of the defendant, either personally or by his solicitor, shall be entered in the margin of the equity docket, by writing his name opposite the name of the defendant for which he appears.

Bills taken pro confesso.

XVII. The plaintiff shall be entitled, immediately after the defendant's appearance is entered, to a rule on defendant, to be entered of course in the prothonotary's office, to file his plea, demurrer, or answer to the bill on the rule day next succeeding that on which he entered his

appearance: provided, twenty days or more intervene between the service of notice of such rule, and the rule day; in default thereof, the plaintiff may, at his election, enter an order (as of course) in the equity docket, that the bill be taken *pro confesso*: and thereupon the cause shall be proceeded in, *ex parte*, and the case may be put upon the next equity argument list, and the matter of the bill may be decreed by the court when there reached in its order, if the same can be done without an answer, and is proper to be decreed; or, the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to, or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause; or it shall be in the option of the plaintiff when such rule shall have been served as aforesaid, instead of taking the bill *pro confesso*, to have process of contempt to compel an answer; in the latter case, the rule must be served personally upon defendant.

XVIII. When the bill is taken *pro confesso*, and the court shall have proceeded to a decree as aforesaid, such decree, so rendered, shall be deemed absolute, unless the court shall, within three months after the service of notice of such decree on the defendant, set aside the same, and give the defendant time for filing the answer, upon cause shown. And no such motion shall be granted, unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

Frame of Bills.

XIX. Every bill, in the introductory part thereof, shall contain the names of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form in substance shall be as follows:—

“To the Judges of the Court, &c.; and thereupon your orator complains, and says, that,” &c.

XX. The plaintiff in his bill shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are

contrary to equity, and that the defendant is without any remedy at law, and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averment, at his option, any matter or thing, which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat*, or any other special order pending the suit, is required, it shall also be specially asked for.

XXI. If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court, as to the other parties. And as to persons who are without the jurisdiction, and may properly be made parties, the bill may pray that process may issue to make them parties to the bill, if they should come within the jurisdiction.

XXII. The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants, under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat*, or any other special order pending the suit, be asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

XXIII. Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him, and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

Scandal and Impertinence in Bills.

XXIV. Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it do, it may on exceptions be referred to a master by any judge of the court for impertinence or scandal, and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court, or a judge thereof, shall otherwise order. If the master shall report

that the bill is not scandalous or impertinent, the defendant shall be entitled to all costs occasioned by the reference.

XXV. No order shall be made by any judge for referring any bill, answer, or pleading, or other matter, or proceeding depending before the court, for scandal or impertinence, unless exceptions are taken in writing, and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same, on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

Amendments of Bills.

XXVI. The plaintiff shall be at liberty, as a matter of course, to amend his bill in any matters whatsoever, before answer, plea, or demurrer to the bill; but he shall without delay give defendant notice of such amendment, and all rules taken by the plaintiff in the case shall be suspended until such notice is given.

XXVII. After an answer, or plea, or demurrer is put in, and before replication, the defendant may, upon motion or petition, with notice, obtain an order from any judge of the court, to amend his bill on or before the next succeeding rule day. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon an order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

XXVIII. If the plaintiff so obtaining any order to amend his bill, after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the prothonotary's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

Demurrers and Pleas.

XXIX. No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and if a plea, that it is true in point of fact.

XXX. The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

XXXI. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

XXXII. If, upon the hearing, any demurrer or plea is overruled, unless the court shall be satisfied that it was intended for vexation and delay, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly; and such decree shall also be made when the court deems the plea or demurrer to have been for vexation or delay, and to have been frivolous or unfounded.

XXXIII. If, upon the hearing, any demurrer or plea shall be allowed, the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

XXXIV. No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

XXXV. No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter, as may be covered by such demurrer or plea.

XXXVI. If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day, when the same is filed,

or on the next succeeding rule day, the defendant shall have the power so to set it down if the plaintiff shall fail or neglect so to do after ten days' notice.

Answers.

XXXVII. The rule, that if a defendant submits to answer, he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might, by plea, protect himself from such answer and discovery. And the defendant shall be entitled in all cases, by answer, to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or of matters of form,) in law, of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters, than he would be compellable to answer and discover, upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defence.—Thus, for example, a *bonâ fide* purchaser, for a valuable consideration, without notice, may set up the defence by way of answer, instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

XXXVIII. A defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer.

XXXIX. The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c., and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively, 1, 2, 3," &c.

XL. The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in, or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

XLI. Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and

according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say:—

“1. Whether, &c.

“2. Whether, &c.”

XLII. A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

XLIII. No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same upon motion to the court, or to a judge thereof, in vacation.

XLIV. In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer within twenty days after the amendment or amended bill is filed, and notice thereof given to him, unless the time therefor is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

Parties to Bills.

XLV. In all cases where it shall appear to the court, that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

XLVI. Where the parties on either side are very numerous, and cannot without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

XLVII. In all suits concerning real estate, which is vested in trustees

by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

XLVIII. In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heirs at law a party, where he desires to have the will established against them.

XLIX. In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

L. Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the equity docket, in the form or to the effect following, that is to say: "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it think fit, shall be at liberty to dismiss the bill.

LI. If a defendant shall, at the hearing of a case, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court, if it shall think fit, shall be at liberty to make a decree, saving the rights of the absent parties.

Nominal Parties to Bills.

LII. Where no account, payment, conveyance, or other direct relief is sought against a party to a suit not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he do not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Injunction Bills.

LIII. Wherever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion and notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party do not appear at the time and place ordered.

Bills of Revivor and Supplemental Bills.

LIV. Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the prothonotary's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the prothonotary, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

LV. Whenever any suit in equity shall become defective, from any event happening after the filing of the bill, (as, for example, by a change of interest in the parties,) or for any other reason, a supplemental bill or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court, on proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto, on the next succeeding rule day after the sup-

plemental bill is filed in the prothonotary's office, unless some other time shall be assigned by a judge of the court.

LVII. It shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

Affidavits to Answers.

LVIII. Every defendant may swear to his answers before any justice or judge of the court of the United States, or before any commissioner appointed by any court to take testimony or depositions, or before any master in chancery appointed by any court, or before any judge of any court of a state or territory, or before any justice of the peace or alderman within this commonwealth.

Amendment of Answers.

LX. After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court or the judge granting the same, may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

Exceptions to Answers.

LXI. After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file, in the prothonotary's office, exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exceptions shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

LXII. Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith order the prothonotary to set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court; and shall give notice of such order to the opposite

party, or his solicitor. And if he shall not so set the same down for a hearing, the exceptions shall be deemed abandoned and the answer shall be deemed insufficient: provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for filing an amended answer, in his discretion, upon such terms as he may deem reasonable.

LXI. If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto, on the next succeeding rule day, unless the time be enlarged by order of the court; otherwise, the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms as the court or judge may direct.

Replication and Issue.

LXII. Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter, unless he shall put the same down on bill and answer; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to a rule upon him to reply at the next rule day, under the penalty of having his bill dismissed; and if at the expiration of such rule said plaintiff shall not have filed his replication, and shall have had ten days' notice, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall upon motion for cause shown, allow a replication to be filed, *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

Testimony, how taken.

LXIII. An order to take the testimony of ancient, infirm, and going witnesses *de bene esse* before any alderman or justice of the peace of the respective county, may be entered by either party in the prothonotary's office, of course, at any time after the service of the subpoena, stipulating

a reasonable notice to the adverse party: so of an order for a commission to any place within the state of Pennsylvania, more than forty miles distant from the county seat of the respective county, or to any other state or territory, or to foreign parts. But in case of a commission, the interrogatories must be filed in the prothonotary's office at the time, and written notice of this last order and of the names of the commissioners must be served on the adverse party, at least fifteen days before the commission issues, in order that he may file cross-interrogatories, or nominate commissioners on his part, if he shall deem it eligible. Provided, that depositions taken before magistrates in the method prescribed in this rule, shall only be allowed to be read in evidence on the hearing of the cause, in case the same facts shall appear before the examiner appointed to take testimony in the cause after it is at issue, and be certified by him to excuse the production of such witnesses before him, as are necessary for the introduction of depositions taken *de bene esse* on trials by jury in the same courts; or if taken by the commissioner before the cause is at issue, under this rule, it shall appear by affidavit at the hearing that the witnesses so examined were aged, infirm, or going out of the country, or that any of them was a single witness to a material fact.

LXIV. The method of taking testimony, except in cases provided for in the foregoing rule, shall be as follows: after the cause is at issue the court shall appoint an examiner, at the request of either party who may first make application, which examiner shall cause such witnesses as either party may name to him to come before him on a reasonable day or days, to be appointed by him, of which he shall give notice to the parties; for the enforcing the attendance of which witnesses, either party may have subpoena or subpoenas returnable before such examiner, to be enforced by the usual process of contempt. The examination shall be conducted by the counsel of the parties, *vivâ voce*, and the answers of the witnesses shall be reduced to writing by the examiner, and the questions also, if necessary to the understanding of the answer, or if it be required by either party: the testimony of both parties shall be taken before the same examiner, and the defendant shall not be compelled to proceed with the taking of his testimony until the plaintiff has finished, or declared he has none to take, nor shall the plaintiff be compelled to proceed with the rebutting testimony until the defendant has completed the testimony on his part; but the court may, upon the special application of either party, upon cause shown, appoint an additional examiner before whom the party making such application may proceed to take his testimony, notwith-

standing the pendency of the proceeding of his adversary before the examiner first named.

LXV. Either party may, on application to the court, obtain an order on his adversary to close the taking of his testimony within three months after notice of such order; any testimony taken after three months' notice of such order shall not be read in evidence at the hearing of the cause. But it shall be in the discretion of the court to enlarge the time on the application of the party against whom such order may have been granted; and no such order shall be granted against a party while, by the provisions of the sixty-fourth rule, such party is not bound to begin until his adversary has closed.

LXVI. Upon the return of the commission executed, the same may, at the application of either party, be opened by any one or more of the judges of the court, in term time or vacation, or by the prothonotary; and the prothonotary shall give notice to the parties of the return of any commission, and of the filing of depositions taken before any alderman, justice of the peace, or examiner; and the parties shall, within ten days after service of such notice upon them respectively, enter exceptions in writing, if they have any, to the form of the interrogatories or the manner of the execution of the commission, and the taking of the depositions, or be forever precluded from the benefit of such exceptions; which exceptions, when so taken, may be put down for hearing by either party at the next rule day, giving notice to his adversary thereof.

Form of the last Interrogatory.

LXVII. The last interrogatory in the written interrogatories to take testimony, now commonly in use, shall in the future be altered and stated in substance thus: "Do you know, or can you set forth any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

Cross Bills.

LXVIII. Where a defendant in equity files a cross bill for recovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

Reference to and proceedings before Masters.

LXIX. Whenever any reference of any matters is made to a master, to examine and report thereon, the party at whose instance, or for whose benefit the reference is made, shall cause the same to be presented to the master for a hearing, on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

LXX. Upon every such reference it shall be the duty of the master, as soon as he reasonably can, after the same is brought before him, to assign a time and place for proceeding in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or in his discretion to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.

LXXI. The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also, to require the production of all books, papers, writings, vouchers, and other documents applicable thereto, where, by the principles of the courts of chancery, the production of them may be compelled; and also, to examine on oath, *vivâ voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate by the prothonotary; and also, to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.

LXXII. All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the account so brought in, shall be at liberty to examine the accounting party, *vivâ voce*, or upon

interrogatories before the master, or by deposition, as the master shall direct.

LXXIII. All affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter may be used before the master.

LXXIV. The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *vivâ voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

LXXV. The courts may appoint standing masters in chancery in their respective jurisdictions, and they may also appoint a master *pro hac vice*, in any particular case. The compensation to be allowed to every master in chancery for his services in any particular cause, shall be fixed by the court in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

Exceptions to report of Master.

LXXVI. No exception will be received to the report of any master, unless the party excepting has filed the same with the master by whom the report has been made, whose duty it shall be, on such exception being filed, to re-examine the subject and amend his report, if in his opinion such exceptions are in whole or in part well founded. And in order to give all parties in interest an opportunity of entering such exception, no master shall file his report until ten days after he has notified to the parties his intention so to do on a day designated, and given them an opportunity of having access to such report. On the hearing of the question of confirming or setting aside the master's report, the party excepting thereto shall be confined to the exception made by him before the master, according to the previous requisition of this rule; reserving to the court, however, the power of committing the report again, should justice require it. On the return of the master's final report, on

the next succeeding rule day, either party may set down the cause for hearing on the next equity argument list.

[This rule is composed partially of the old rule of March 1844, and partially of a new one adopted January 1847. In the court of common pleas of Philadelphia county, though not in the supreme court, the rule proceeds as follows:]

And it is further ordered, that all reports of auditors and masters in the court of common pleas, shall be confirmed on the third Saturday next succeeding the day on which they shall have been respectively filed, unless in case of exceptions duly filed as provided by the foregoing rule.

Decrees.

LXXVII. Clerical mistakes in decrees, or decretal orders, or errors, arising from any accidental slip or omission, may be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

LXXVIII. In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and, therefore, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:" (here insert the decree or order.)

LXXIX. The decree shall be drawn by the solicitor of the party in whose favour it is, who shall serve a copy thereof on the solicitor of the adverse party, with notice of the time, which shall not be less than three days thereafter, when the same will be submitted to the court. If the opposite party shall not deem such draft of decree in conformity with the intentions of the court, he may file exceptions before the day of hearing designated in such notice, which shall be submitted with the draft of the decree on the day so prefixed, and thereupon the court approving of the draft or correcting the same in conformity with such exceptions or otherwise, the prothonotary shall enter it in his equity docket, and from thenceforth it shall become the act and decree of the court.

LXXX. If the decree be merely for the payment of money, the party in whose favour it is made shall be entitled to have a minute thereof (without waiting for the draft of a more formal decree) entered in the equity docket, and placed in the usual form of entering judgments, in the judgment index of the common law side of the court.

Guardians and prochein amis.

LXXXI. Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons, who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable, may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the court may direct for the protection of infants and other persons.

Rehearings.

LXXXII. Every petition for rehearing, shall contain the special matter or cause on which such rehearing is applied for, shall be signed by the counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. A petition for rehearing may be granted at any time within the discretion of the court; but where the decree has been executed, parties who have acted on the faith of such decree shall not be injured by such decree being reversed or varied.

General Regulations.

LXXXIII. The courts may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

LXXXIV. In all cases, when the rules prescribed by this court, or by the court of common pleas, do not apply, the practice of the courts shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

LXXXV. Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

EQUITY FEE BILL.

ADOPTED BY THE SUPREME COURT, AND THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY.¹

Prothonotary's Fees.

Filing bill, original or subsequent thereto, ...	50
Docketing every cause, ...	25
Subpœnas, all names, ...	1 50
Office copy of any paper, for every line of ten words, ...	1½
Certificate to office copy, when made by a party, ...	37½
Entering every motion, rule, and report, and filing exceptions, ...	12½
Every order of reference to a master, ...	25
Entering every order and decree in a cause, and for every injunction, for every line of ten words, ...	1½
Subpœna to testify, the same as at law, ...	
Every other writ, same as at law, ...	
Affixing the seal of the court, the same as at law, ...	
Administering oath or affirmation, ...	12½
Stationery, in every cause in which decree is made, ...	75
Taxing bill of costs, ...	1 50

Examiner's Fees.

Taking depositions, per line of ten words, ...	5
Exhibits, each, ...	25
Administering oaths or affirmations, ...	12½
Subpœna, same as prothonotary, ...	
Attesting and returning depositions, ...	1 50
The examiner is to be paid, as for taking a deposition of one page of thirty lines, by a party who makes an appointment to take depositions, and does not attend, or attends, and does not examine a witness.	

Fees of the Sheriff, Witnesses, Surveyors, and Commissioners in Dower and Partition.

Sheriff's fees for service of subpœna, and to appear and answer, and of injunction, the same as service of summons at law.
Witnesses' fees, the same as at law.

¹ See Purdon's Digest, 774.

Fees of commissioners appointed to make partition, or to admeasure dower, and of surveyors appointed to make surveys in such cases,—for every day's actual and necessary service—two dollars to each,

For necessary assistants to the same,—one dollar per day.

Party's Costs.

For drawing bill, answer or other pleading, demurrer, exceptions, interrogatories, and any decree or order of the court, for every page of thirty lines, each of ten words, ten cents for each line of the first page, and six cents per line for each subsequent page.

For every motion, and notice thereof to the opposite party, . . . 20

For service of subpoena to testify, the same as at law,

Copy, to keep, of any paper that shall be filed in the cause, one half of the allowance for an office copy.

EQUITY FEE BILL.

ADOPTED BY THE DISTRICT COURT FOR THE COUNTY OF ALLEGHENY.¹

Prothonotary's Fees.

Filing bill, original or subsequently thereto, ...	50
Docketing every cause, ...	1 00
Subpoena, all names, ...	1 50
Office copy of any paper, for every ten words, ...	1½
Certificate to copy, when made by the party, ...	75
Entering any motion, rule, report, or filing exceptions, ...	12½
Each order of reference to a master, commissioner, or examiner, ...	25
Entering every order, or decree, each ten words, ...	1½
Subpoena to testify, same as at law	
Every other writ, same as at law	
Affixing the seal of the court, ...	25
Administering oath or affirmation, ...	12½
Stationery, in each cause, ...	75
Taxing each bill of costs, ...	1 00
Entering appeal and making up record for supreme court, ...	1 50

¹ See Purdon's Digest, 1070.

Taking and filing any recognizance or bond, ...	50
Entering proceedings of supreme court, ...	50
Writ of injunction, ...	1 25

Examiner's Fees.

Taking depositions for every ten words, ...	2
Copying exhibits, ...	1½
Administering oath or affirmation, ...	12½
Subpœna, same as prothonotary.	
Attesting and returning depositions, exhibits, &c., ...	1 50
A party making an appointment to take depositions and failing to attend, or attending and not examining a witness, shall pay the examiner, ...	1 00

Sheriff's Fees.

Serving subpœna or injunction, same as sci. fa. at law.
Any other writ, order, or notice, same as a summons at law.

Commissioner.

Commissioner appointed to admeasure dower, or make partition, and of surveyors appointed to make surveys in such cases, for each day's actual and necessary service, ...	2 00
Each necessary assistant, per day, ...	1 00

Party's Costs.

Drawing bill, answer, demurrer, or other pleading; exception, interrogatories, and any decree or order of court:—first five pages, of 300 words each, per page, ...	2 00
Next five or fewer pages of 300 words each, per page, ...	75
Each additional page of 300 words, ...	37½
Each motion or notice thereof to opposite party, ...	20
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